DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-574
Title: Anthony Walden, Petitioner
v.
Gina Fiore, et al.
Docketed: November 8, 2012
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-17558)
Decision Date: August 8, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 6 2012	Petition for a writ of certiorari filed. (Response due December 10, 2012)
Nov 30 2012	Order extending time to file response to petition to and including January 9, 2013.
Jan 4 2013	Order further extending time to file response to petition to and including January 24, 2013.
Jan 24 2013	Brief of respondents Gina Fiore, and Keith Gipson in opposition filed.
Feb 6 2013	DISTRIBUTED for Conference of February 22, 2013.
Feb 6 2013	Reply of petitioner Anthony Walden filed. (Distributed)
Feb 25 2013	DISTRIBUTED for Conference of March 1, 2013.
Mar 4 2013	Petition GRANTED.
Mar 7 2013	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the petitioner.
Mar 12 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Mar 25 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 28, 2013.
Mar 25 2013	The time to file respondents' brief on the merits is extended to and including July 26, 2013.
May 28 2013	Joint appendix filed. (Statement of costs received)
May 28 2013	Brief of petitioner Anthony Walden filed.
May 31 2013	Brief amicus curiae of Charles W. Adams filed.
Jun 3 2013	Brief amici curiae of New England Legal Foundation and Associated Industries of Massachusetts filed.
Jun 4 2013	Brief amicus curiae of the United States filed.
Jun 4 2013	Brief amicus curiae of Chamber of Commerce of the United States of America filed.

Jun 4 2013	Brief amicus curiae of Federal Law Enforcement Officers Association filed.
Jun 4 2013	Brief amici curiae of Alabama, et al. filed.
Jul 26 2013	Brief of respondents Gina Fiore and Keith Gipson filed.
Jul 29 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 2 2013	Brief amicus curiae of Workers' Injury Law & Advocacy Group filed.
Aug 19 2013	CIRCULATED..
Aug 20 2013	SET FOR ARGUMENT on Monday, November 4, 2013.
Aug 26 2013	Reply of petitioner Anthony Walden filed. (Distributed)
Sep 24 2013	Record from U.S.C.A for 9th Circuit is electronic.
Sep 24 2013	Record from U.S.D.C. for District of Nevada is electronic.
Oct 7 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 4 2013	Argued. For petitioner: Jeffrey S. Bucholtz, Washington, D. C.; and Melissa Arbus Sherry, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Thomas C. Goldstein, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
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No. 12-574

In the
Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State.

2. Whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue under 28 U.S.C. § 1391(b)(2) even if the defendant's alleged acts and omissions all occurred in another district.

PARTIES TO THE PROCEEDING

Petitioner Anthony Walden was the defendant-appellee in the court below. Respondents Gina Fiore and Keith Gipson were plaintiffs-appellants in the court below. In the district court, respondents also asserted claims against "three unknown agents/attorneys with the United States Drug Enforcement Agency." Those defendants were also listed in the caption as appellees in the court below.

TABLE OF CONTENTS

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved.... 1
Statement 2
Reasons for granting the petition 11
I. This Court should grant review to decide whether an intentional act taken with knowledge that a plaintiff has connections to the forum constitutes "express aiming" at the forum..... 13
A. The Circuits are split over the meaning of the express-aiming requirement 13
B. The Ninth Circuit erred in finding the express-aiming test satisfied 22
C. The issue is important..... 25
D. This case is a good vehicle..... 28
II. This Court should grant review to decide whether the place of a plaintiff's injury is a proper venue even if the defendant's alleged acts and omissions all occurred elsewhere..... 30
Conclusion..... 37
Appendix A – Court of appeals opinion (Sept. 12, 2011; amended Aug. 8, 2012) 1a
Appendix B – District court order granting motion to dismiss (Oct. 17, 2008) 65a
Appendix C – Order denying petition for rehearing and dissents from denial thereof (Aug. 8, 2012) 75a

TABLE OF AUTHORITIES

Cases

Bancroft & Masters, Inc. v. Augusta Nat'l Inc.,
223 F.3d 1082 (9th Cir. 2000) 15, 18, 20

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 12, 13, 23

Calder v. Jones,
465 U.S. 783 (1984) ..... *passim*

Dakota Indus., Inc. v. Dakota Sportswear, Inc.,
946 F.2d 1384 (8th Cir. 1991) 16

Daniel v. Am. Bd. of Emergency Med.,
428 F.3d 408 (2d Cir. 2005) 32

Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,
514 F.3d 1063 (10th Cir. 2008) 14, 18, 21

ESAB Grp., Inc. v. Centricut, Inc.,
126 F.3d 617 (4th Cir. 1997) 18

Far West Capital, Inc. v. Towne,
46 F.3d 1071 (10th Cir. 1995) 18

Goodyear Dunlop Tires Ops. S.A. v. Brown,
131 S. Ct. 2846 (2011) 11

Hanson v. Denckla,
357 U.S. 235 (1958) 24

Imo Industries, Inc. v. Kiekert AG,
155 F.3d 254 (3d Cir. 1998) ..... *passim*

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) 12

J. McIntyre Mach., Ltd. v. Nicastro,
131 S. Ct. 2780 (2011) 11, 12, 23, 24

Jenkins Brick Co. v. Bremer,
321 F.3d 1366 (11th Cir. 2003) 31, 32, 34

Johnson v. Arden,
614 F.3d 785 (8th Cir. 2010) ..... *passim*

Kulko v. Super. Ct. of Cal.,
436 U.S. 84 (1978) 24

Leroy v. Great W. United Corp.,
443 U.S. 173 (1979) 30, 34, 35

Licciardello v. Lovelady,
544 F.3d 1280 (11th Cir. 2008) 20

Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.,
623 F.3d 440 (7th Cir. 2010) 14, 17, 24

Myers v. Bennett Law Offices,
238 F.3d 1068 (9th Cir. 2001) 8, 30

Noonan v. Winston Co.,
135 F.3d 85 (1st Cir. 1998) 19

Panda Brandywine Corp. v. Potomac Elec. Power Co.,
253 F.3d 865 (5th Cir. 2001) 19

Remick v. Manfredy,
238 F.3d 248 (3d Cir. 2001) 17

Reynolds v. Int'l Amateur Athletic Fed'n,
23 F.3d 1110 (6th Cir. 1994) 19

Shrader v. Biddinger,
633 F.3d 1235 (10th Cir. 2011) 18

Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007) 30

Woodke v. Dahm, 70 F.3d 983 (8th Cir. 1995) 31, 33, 35

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 12, 23, 25

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1391(b)(2) ..... *passim*

28 U.S.C. § 1391(e)(1)(C) 33

28 U.S.C. § 1402(b) 33

42 U.S.C. § 1983 26

Nev. Rev. Stat. § 14.065 5

Regulations

28 C.F.R. § 50.15 26

28 C.F.R. § 50.16 26

PETITION FOR A WRIT OF CERTIORARI

Anthony Walden respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App. 1a–64a) is reported at 688 F.3d 558, 570. The order of the district court granting petitioner's motion to dismiss (App. 65a–71a) is unreported.

JURISDICTION

The court of appeals issued its opinion on September 12, 2011. App. 1a. That court amended its opinion and denied rehearing on August 8, 2012. App. 75a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Section 1391(b)(2) of Title 28 of the United States Code, governing venue, provides that a civil action may be brought in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated."

STATEMENT

Petitioner Anthony Walden's conduct at issue in this case occurred entirely in Georgia. The Ninth Circuit held that petitioner could nonetheless be sued in Nevada. As to personal jurisdiction, the Ninth Circuit's rationale was that petitioner knew that respondents had connections to Nevada and so his conduct in Georgia should be deemed to have been "expressly aimed" at Nevada. As to venue, the Ninth Circuit's rationale was that respondents' claimed injury occurred in Nevada. Both holdings exacerbate circuit splits, and both holdings are wrong.

1. Petitioner is a police officer employed by the City of Covington, Georgia. App. 10a. Between 2002 and 2006, petitioner was a deputized agent for the Drug Enforcement Agency (DEA), assigned to duty at Atlanta's Hartsfield-Jackson International Airport as part of a federal/state anti-narcotics task force. *Id.*

This case arises out of events that took place at the Atlanta airport on August 8, 2006.[1] That day, respondents Gina Fiore and Keith Gipson arrived at the Atlanta airport on a flight from San Juan, Puerto Rico. App. 3a. Respondents are professional gamblers who had spent time at casinos in San Juan and in Atlantic City, New Jersey and who were flying from San Juan through Atlanta on the way to Las Vegas, Nevada. App. 2a–3a.

Between them, respondents were carrying approximately $97,000 in cash. App 3a. This money

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[1] Because this appeal arises out of a ruling on a motion to dismiss, the facts alleged in the complaint are taken as true.

had been discovered during a search of respondents' bags at the San Juan airport, which led to questioning by several DEA agents there. *Id.* Respondents had told the agents that they obtained the cash legally through gambling. *Id.* The agents in San Juan allowed respondents to board their flight with the cash, but told them that they might face additional questioning later. App 4a.

When respondents arrived in Atlanta, they were approached and questioned in the gate area by petitioner and another DEA agent. *Id.* Respondents again asserted that the money was obtained from gambling activities. *Id.* They showed petitioner their driver's licenses, which were issued by California. App. 20a. Respondents allege that they maintain residences in Nevada as well as California. App. 4a. A third DEA agent arrived with a narcotics-detecting dog. App. 5a. The dog pawed at Gipson's bag. *Id.* The agents informed respondents that the dog's reaction indicated the presence of contraband, and accordingly seized the funds. *Id.* Petitioner told respondents that they could recover the money by producing documents showing that it was legitimately obtained. *Id.*

Respondents then boarded their flight to Las Vegas. *Id.* Over the next few weeks, they forwarded several documents to petitioner in an effort to show the legitimacy of the funds. *Id.* Respondents claim that, despite receiving this information, petitioner assisted in drafting a false affidavit to attempt to show probable cause for forfeiture of the funds, which he submitted to the Office of the United States Attorney for the Northern District of Georgia. App.

6a. An Assistant United States Attorney in that District ultimately concluded that there was not probable cause to forfeit the funds. App. 7a. The funds were returned to respondents on March 1, 2007. *Id.*

2. Respondents filed a *Bivens* suit against petitioner and three unnamed officials in the United States District Court for the District of Nevada. *Id.* Respondents alleged that petitioner violated respondents' Fourth Amendment rights by: seizing the cash without probable cause; retaining the cash after receiving proof that it had been obtained legitimately; knowingly compiling a false or misleading probable cause affidavit; and referring the matter for forfeiture based on false or deficient information while withholding exculpatory information. App. 7a–8a.[2]

Petitioner moved to dismiss. App. 8a. Petitioner argued that Nevada did not have personal jurisdiction over petitioner. *Id.* Petitioner pointed out that he never contacted anyone in Nevada or directed anyone to take action in Nevada; he has never traveled to Nevada, owned property in Nevada, or conducted any personal business in Nevada; and

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[2] There was disagreement below over whether respondents asserted one claim or multiple distinct claims. Compare App. 43a–44a (maj. op.) with App. 54a–56a (Ikuta, J., dissenting). The panel majority read the complaint as containing a distinct claim related to the allegedly false probable cause affidavit. App. 43a–44a. For purposes of this Court's review, petitioner does not challenge the panel majority's conclusion that respondents asserted a distinct claim related to the probable cause affidavit.

respondents provided him with California, not Nevada, drivers' licenses. Decl. of Anthony Walden ¶¶ 7-11, 15, *Fiore v. Walden*, No. 07-1674, Dkt. No. 14-2 (D. Nev. Aug. 1, 2008). Petitioner also argued that the District of Nevada was not a proper venue under 28 U.S.C. § 1391(b) because the alleged "events and omissions giving rise to" respondents' claims occurred entirely in Georgia, not Nevada. Motion to Dismiss at 14, *Fiore v. Walden*, No. 07-1674, Dkt. No. 14 (D. Nev. Aug. 1, 2008).

The district court granted petitioner's motion to dismiss. App. 66a–74a. Because Nevada law authorizes personal jurisdiction up to the limits of due process, the district court analyzed whether the Fourteenth Amendment would permit a Nevada court to exercise personal jurisdiction over petitioner. App. 68a (citing Nev. Rev. Stat. § 14.065). Respondents conceded that due process required them to allege that petitioner had "purposeful[ly] direct[ed]" his actions toward Nevada. App. 70a. The district court explained that to make this showing, respondents needed to satisfy what is commonly called the "effects test" of *Calder v. Jones*, 465 U.S. 783 (1984), which requires a showing that (1) the defendant committed an intentional act that was (2) "expressly aimed" at the forum state and that (3) the defendant knew that harm would be suffered in the forum state. App. 70a. The district court concluded that respondents could not satisfy the "express aiming" prong of the test:

> Walden's intentional act—the search of Plaintiffs' luggage and seizure of their currency—was expressly aimed at Georgia,

> not Nevada. Walden's search of Plaintiffs' luggage took place in Georgia. Walden's questioning of Plaintiffs took place in Georgia. Walden's seizure of Plaintiffs' currency took place in Georgia. It may be true, as Plaintiffs allege, that Walden's intentional acts committed in Georgia eventually caused harm to Plaintiffs in Nevada, and Walden may have known that Plaintiffs lived in Nevada. But this alone does not confer jurisdiction.

App. 71a–72a. Because the district court concluded that personal jurisdiction was lacking, it did not address petitioner's venue argument. App. 73a.

3. A divided panel of the Ninth Circuit reversed.

a. The panel majority held that personal jurisdiction over petitioner was proper in Nevada. In the majority's view, the district court had erred in its analysis of the express-aiming requirement by "not consider[ing] the false probable cause affidavit aspect of the case." App. 17a. As to that claim in particular, the express-aiming requirement was satisfied, the court of appeals concluded. *Id.*

As the panel explained, the "allegations indicate that at the time the assertedly false affidavit was composed and filed, Walden recognized that the plaintiffs had significant connections to Nevada, particularly with respect to the funds for which forfeiture was being sought." App. 22a. Nor did it matter "whether Fiore and Gipson were legal residents of Nevada or whether they simply had a significant connection to the forum," App. 22a–23a; it

was enough that the complaint alleged that petitioner "necessarily recognized, at least by the time he wrote the probable cause affidavit, that the plaintiffs had a connection to Nevada," App. 24a.

The court of appeals then found the other requirements of due process satisfied. App. 27a–36a. Accordingly, it held that "the district court erred in concluding that it lacked personal jurisdiction over Walden, at least as to the portion of Fiore and Gipson's complaint pertaining to the false probable cause affidavit and resulting delay in returning the funds." App. 38a.[3]

Having concluded that the district court properly had jurisdiction over at least one of respondents' claims, the court of appeals directed the district court to determine whether to exercise "pendent personal jurisdiction" over respondents' remaining claims. App. 38a–39a. The majority made no secret of its desire that the district court rely on this doctrine (which no party had raised in the appeal) to exercise jurisdiction over the entire case, noting that "the same facts will have to be developed with regard to the search and seizure and false affidavit claims" and that this "weigh[ed] strongly in favor of the exercise of pendent personal jurisdiction." App. 39a.

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[3] Notwithstanding its holding that personal jurisdiction could be based on petitioner's conduct that allegedly caused "delay in returning the funds," App. 28a, the panel majority acknowledged that, as a local police officer deputized as a temporary DEA agent, petitioner had no authority to release the seized funds. App. 11a n.11.

The court of appeals also held that venue over respondents' suit was proper in the District of Nevada. App. 40a–42a. Relying on circuit precedent holding that "the locus of the injury" is a "relevant factor" in determining whether venue is appropriate under 28 U.S.C. § 1391(b)(2), App. 41a (quoting *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001)), the majority reasoned that venue was proper because respondents "suffered harm in Nevada." *Id.* As the court of appeals explained,

> All the economic injuries suffered by Fiore and Gipson were realized in Nevada . . . Walden fabricated a fraudulent probable cause affidavit to institute forfeiture proceedings against Fiore and Gipson after they had returned to their residences in Nevada . . the documentation of the legitimacy of the money was sent from Nevada; and the funds eventually were returned to Fiore and Gipson in Nevada . . . . The arrival of the funds in Nevada was the event that caused Fiore and Gipson's cause of action to mature, because their case was not ripe until the government abandoned the forfeiture case against them.

App. 41a–42a.

Judge Ikuta dissented from the majority's personal jurisdiction holding. She argued that the majority erred in reading the complaint as containing multiple claims; on her reading, "the plaintiffs allege[d] one simple claim: a violation of their Fourth Amendment rights to be free of unreasonable searches and seizures." App. 54a. Under that

reading, personal jurisdiction was lacking because "[t]he complaint does not even hint that Walden learned of plaintiffs' ties to Las Vegas until *after* the seizure was complete." App. 53a–54a (emphasis in original). The majority's ruling was problematic, Judge Ikuta explained, because it "essentially requires courts to assert personal jurisdiction over any defendant who learns about the home state of the plaintiff at any time *after* the defendant engaged in the conduct that formed the basis of plaintiff's claim. To ensure this result, plaintiffs need only assert that the defendant knew their home state and subsequently engaged in some wrongful act." App. 57a–58a (emphasis in original).

b. Petitioner filed a petition for rehearing. The court of appeals denied that petition with eight judges writing or joining opinions dissenting from that denial.

Judge O'Scannlain, joined by four other judges, dissented from the denial of rehearing. The panel "disregard[ed] *Calder*'s express-aiming requirement," Judge O'Scannlain explained, because "Walden did not learn of Fiore and Gipson's ties to Nevada until after the seizure was complete" and thus "Walden simply could not have 'expressly aimed' his relevant conduct—the seizure conduct that forms the basis of Fiore and Gipson's one claim—at Nevada." App. 83a. Judge O'Scannlain also noted that the panel's decision "conflict[ed] with cases in other circuits over how to interpret and to apply *Calder*'s express-aiming requirement. The majority of circuits have held that, under *Calder*, a defendant must expressly aim the conduct forming the basis of the claim *at the*

forum state—not just at a known forum resident—before the courts of that state may exercise jurisdiction over the defendant." App. 84a (emphasis in original).

Judge McKeown also dissented, joined by six other judges. In her view, the panel had, "[w]ith the stroke of a pen," returned the Ninth Circuit "to a discredited era of specific personal jurisdiction, where foreseeability reigns supreme and purposeful direction is irrelevant." App. 91a. The panel had "broaden[ed] the specific jurisdiction test from one requiring targeted 'express aiming' to one where any attenuated foreign act with foreseeable effects upon a forum resident confers specific jurisdiction." App. 94a. The *en banc* court should have reheard the case, Judge McKeown argued, because "[i]f due process limitations on personal jurisdiction are to retain any guiding force, purposeful direction may not be collapsed into a diluted version of foreseeability." App. 95a.

The panel majority amended the original opinion by adding a "post-script" responding to the dissents from denial of rehearing. The majority asserted that "[u]nder our caselaw and that of the Supreme Court, [respondents'] known connections [to the forum state] are more than sufficient to support personal jurisdiction." App. 44a–45a. The majority defended its holding that an intentional act taken with knowledge of the eventual plaintiff's connections to the eventual forum is sufficient: "Walden intentionally targeted persons and funds with substantial connections to Nevada. He thus expressly

aimed his conduct at that state, providing a sufficient basis for personal jurisdiction." App. 47a.

Judge Ikuta also added a post-script to her dissent. Under the panel's opinion, she lamented, "federal officials working in a transportation hub who are sued by disgruntled travelers can now be forced to litigate in any traveler's home state." App. 63a. That approach "not only flouts common sense, but also ignores the Supreme Court's recent recognition that personal jurisdiction continues to play a vital role in defending basic fairness and due process." App. 64a (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786–87 (2011) (plurality op.)).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's ruling on personal jurisdiction exacerbated a six-to-two circuit split. Most circuits hold that, under *Calder v. Jones*, 465 U.S. 783 (1984), the defendant must have expressly aimed his conduct at the forum state itself—not merely at an individual who happens to have connections to the forum state. The decision below makes clear that the Ninth Circuit, joined by the Eleventh Circuit, disagrees and requires only that the defendant have taken an intentional act with knowledge that the plaintiff resides in or has connections with the forum state.

The Ninth Circuit's decision also reinforced a square circuit split on the meaning of the general federal venue statute, 28 U.S.C. § 1391(b)(2). Three circuits hold that a district "in which a substantial part of the events or omissions giving rise to the claim occurred" is a district in which a substantial

part of the defendant's alleged misconduct occurred. The Ninth Circuit, in contrast, holds that venue lies wherever the plaintiff felt the injury, even if the defendant's alleged conduct all occurred elsewhere.

Both issues are important, and both are cleanly presented. This Court has taken pains to remind the lower courts that limits on personal jurisdiction remain a vital component of due process. See, *e.g.*, *Goodyear Dunlop Tires Ops. S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). And this Court for decades has consistently rejected basing personal jurisdiction on mere foreseeability that conduct in one state may have effects in a distant forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); see also *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality op.). Yet the Ninth Circuit has approved haling a law enforcement officer into court in Nevada to face a personal-capacity damages suit based on conduct occurring entirely in Georgia. "Because nothing is reasonable about returning to the unhinged, freeform foreseeability standard rejected by *Burger King* and *Calder*," App. 95a (McKeown, J., dissenting from denial of rehearing), this Court's review is sorely needed.

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER AN INTENTIONAL ACT TAKEN WITH KNOWLEDGE THAT A PLAINTIFF HAS CONNECTIONS TO THE FORUM CONSTITUTES "EXPRESS AIMING" AT THE FORUM

A. The Circuits Are Split Over the Meaning of the Express-Aiming Requirement

Under the Fourteenth Amendment's Due Process Clause, a court may exercise jurisdiction over a defendant only when the defendant has sufficient contacts with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). Where specific jurisdiction is at issue, due process requires that the defendant have purposefully directed his conduct at the forum, which "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 472 (internal quotation marks omitted).

In the context of intentional tort claims, *Calder v. Jones*, 465 U.S. 783 (1984), provides the analytical framework for applying the purposeful-direction requirement. In *Calder*, the plaintiff, a California resident whose career as an actress was based in California, alleged that the defendants, a reporter and an editor who resided in Florida, had libeled her in an article published in the *National Enquirer*. The Court emphasized several points in holding that a California court could exercise jurisdiction over the defendants. First, "[t]he allegedly libelous story

concerned the California activities of a California resident"; second, it "was drawn from California sources"; third, "the brunt of the harm, in terms both of [defendant's] emotional distress and the injury to her professional reputation, was suffered in California." *Id.* at 788–89. For these reasons, the Court held that "California [was] the focal point both of the story and of the harm suffered." *Id.* at 789.

The Court also stressed that the defendants were "not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California." *Id.* That is, they "knew [their actions] would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation." *Id.* at 789–90.

Lower courts have distilled *Calder*'s holding into a three-part test, sometimes referred to as the "*Calder* effects test." *E.g.*, *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010).[4] Under that test, a plaintiff

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[4] The Seventh Circuit has noted that the phrase "express aiming test" is more faithful to *Calder*, for "[i]t properly focuses attention on whether the defendant intentionally aimed its conduct at the forum state, rather than on the possibly incidental and constitutionally irrelevant effects of that conduct on the plaintiff." *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440, 445 n.1 (2010). The label for the *Calder* test is ultimately unimportant, however; what matters is that the courts of appeals agree that *Calder* contains an express-aiming requirement but disagree about what that requirement means.

must allege that the defendant committed "(a) an intentional action . . . that was (b) expressly aimed at the forum state . . . with (c) knowledge that the brunt of the injury would be felt in the forum state." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1072 (10th Cir. 2008).

This case turns on the second prong of that test: the express-aiming requirement. The Ninth Circuit held that respondents' allegation that petitioner prepared a false probable cause affidavit in support of the forfeiture of respondents' funds satisfied this requirement. Petitioner prepared the affidavit in Georgia and sent it to the U.S. Attorney's Office for the Northern District of Georgia for potential use in proceedings that would be filed in Georgia to forfeit funds that were seized in Georgia. App. 6a. According to the Ninth Circuit, however, petitioner's preparation of the affidavit was expressly aimed at Nevada because "Walden individually targeted Fiore and Gipson, as he was aware of their significant connection to Nevada and of the likely impact of his defrauding actions on their property and business in Nevada." App. 27a. Or as the majority explained its holding in its post-script, "Walden intentionally targeted persons and funds with substantial connections to Nevada. He thus expressly aimed his conduct at that state, providing a sufficient basis for personal jurisdiction." App. 47a.

In reaching that conclusion, the court of appeals relied on circuit precedent holding that the express-aiming "requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to

be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). But the decision below extended that rule, holding that *Calder* requires only that a defendant's act have an "*intended* impact that is targeted at a known individual who has a substantial, ongoing connection to the forum," even if the individual is not a resident of the forum. App. 19a (emphasis in original).

The Ninth Circuit's approach squarely conflicts with the rulings of at least six other circuits. As Judge O'Scannlain noted in dissent below, "[t]he majority of circuits have held that, under *Calder*, a defendant must expressly aim the conduct forming the basis of the claim *at the forum state*—not just at a known forum resident—before the courts of that state may exercise jurisdiction over the defendant." App. 84a (emphasis in original).

The Eighth Circuit's decision in *Johnson v. Arden*, 614 F.3d 785 (2010), provides a good example of how most circuits apply *Calder*'s express-aiming requirement and how that majority approach conflicts with the Ninth Circuit's interpretation. The plaintiffs in *Johnson*, who were cat breeders in Missouri, alleged that the defendant, a Colorado resident, had defamed them in posts on an Internet message board. The plaintiffs sued in Missouri where they suffered the reputational injury, but the Eighth Circuit held that the complaint "fail[ed] to show that [the defendant] uniquely or expressly aimed her statements at Missouri." *Id.* at 796. This was so even though the allegedly defamatory post explicitly referenced the plaintiffs' activities in Missouri. As

the court explained, "[t]he statements were aimed at the [plaintiffs]; the inclusion of 'Missouri' in the posting was incidental and not 'performed for the very purpose of having their consequences' felt in Missouri." *Id.* (quoting *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1390–91 (8th Cir. 1991)).

The Third Circuit took a similar approach in *Imo Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 256 (1998). There, the plaintiff alleged that the defendant had intentionally interfered with the plaintiff's business activities, knowing that plaintiff was headquartered in New Jersey. The court concluded that "[s]imply asserting that the defendant knew that the plaintiff's principal place of business was located in the forum [is] insufficient in itself to meet [*Calder*'s express-aiming] requirement." *Id.* at 265. "While knowledge that the plaintiff is located in the forum is necessary," the Third Circuit explained that "it alone is insufficient to satisfy the targeting prong of the effects test." *Id.* at 266; see also *id.* at 265 n.8. That is because *Calder* requires not only that the forum be "the focal point of the harm suffered by the plaintiff," but also that the defendant have "expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity" as well. *Id.* at 266. Applying that standard, the Third Circuit concluded that exercising personal jurisdiction in New Jersey would be improper, because "Imo cannot demonstrate that Kiekert expressly aimed its tortious conduct at New Jersey." *Id.* at 268; see also *Remick v. Manfredy*, 238 F.3d 248, 258–59 (3d Cir. 2001) (relying on *Imo* in holding that defendants had not expressly aimed their

conduct at Pennsylvania despite allegation that they intentionally defamed a Pennsylvania resident).

So too with the Seventh Circuit. In *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A.*, 623 F.3d 440 (2010), the plaintiff, an Illinois corporation, alleged that the defendant, a Texas-based company, had intentionally infringed upon the plaintiff's trademark. The plaintiff argued that the defendant had expressly aimed its conduct at Illinois, because the defendant allegedly knew the plaintiff was based in Illinois. The Seventh Circuit disagreed, explaining that the plaintiff's argument "would make any defendant accused of an intentional tort subject to personal jurisdiction in the plaintiff's home state as soon as the defendant learns what that state is. *Calder* requires more." *Id.* at 447. The "proper[] focus" instead is "on whether the defendant intentionally aimed its conduct at the forum state." *Id.* at 445 n.1.

The Tenth Circuit, like the Third Circuit, has made clear that *Calder* requires *both* "that a defendant must know that the harm . . . was suffered in the forum state" *and* that "the forum state itself must be 'the focal point of the tort.'" *Dudnikov*, 514 F.3d at 1074 n.9, 1075 (citing *Far West Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995)) (other internal quotation omitted). And the Tenth Circuit emphasized that "the 'express aiming' test focuses more on a defendant's intentions—where was the 'focal point' of [his] purposive efforts" than on "where . . . the alleged harm [was] actually felt by the

plaintiff." *Id.* at 1075; see also *Shrader v. Biddinger*, 633 F.3d 1235, 1244 (10th Cir. 2011).[5]

The Fourth Circuit, too, has rejected the notion that intentional actions directed at known forum residents are in and of themselves sufficient to meet the express-aiming requirement. As that court explained, "[a]lthough the place that the plaintiff feels the alleged injury is plainly relevant to the inquiry, it must ultimately be accompanied by the defendant's own contacts with the state if jurisdiction over the defendant is to be upheld." *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997). Treating the plaintiff's residence in the forum as sufficient would be improper, because "[i]nstead of grounding jurisdiction . . . on a defendant's activities 'expressly aimed' at the forum state, *Calder*, 465 U.S. at 789, jurisdiction would depend on a *plaintiff's* decision about where to establish residence." *Id.* at 625-26 (emphasis in original).

The Fifth Circuit also follows the majority approach. In *Panda Brandywine Corp. v. Potomac Electric Power Co.*, 253 F.3d 865, 870 (2001) (per curiam), the court held that an allegation that the defendant "knew [that the plaintiffs] are Texas

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[5] The Tenth Circuit noted in *Dudnikov* that it takes a "somewhat more restrictive approach" than the approach the Ninth Circuit had taken before this case. 514 F.3d at 1075 n.9 (citing *Bancroft*, 223 F.3d at 1087). As Judge O'Scannlain's dissent explains, the decision below clarifies and extends the Ninth Circuit's looser approach, and the conflict between the Tenth and Ninth Circuits is thus all the more clear now. See App. 75a–77a.

residents and knew its actions would intentionally cause harm to [the plaintiffs] in Texas" was insufficient to justify personal jurisdiction over the defendant in Texas. *Id.* at 869. Although the defendant may have "purposefully directed its actions toward [the plaintiffs]," the dispute had "no relation to Texas other than the fortuity that [the plaintiffs] reside there." *Id.* at 869.[6]

By contrast, the Eleventh Circuit agrees with the Ninth Circuit that *Calder*'s express-aiming requirement is satisfied whenever the defendant "individually target[s] a known forum resident." *Licciardello v. Lovelady*, 544 F.3d 1280, 1287 (11th Cir. 2008) (citing *Bancroft*, 223 F.3d at 1088). In limiting its holding to "known forum resident[s]," however, the Eleventh Circuit has not gone as far as the Ninth Circuit. As explained, the decision below stressed that the intended target of the defendant's action need not even be a forum resident for conduct aimed at the target to constitute express aiming at

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[6] Two other circuits, the First and the Sixth, appear to follow the majority view as well, although neither has addressed the issue as clearly as the Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits. See *Noonan v. Winston Co.*, 135 F.3d 85, 90–92 (1st Cir. 1998) (concluding that defendant did not expressly aim its conduct at Massachusetts even though plaintiff, a Massachusetts resident, alleged that defendant intentionally misappropriated his likeness to use in advertising); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994) (refusing to allow personal jurisdiction in Ohio based solely on allegation that defendant's press release intentionally defamed known Ohio resident, because Ohio "was not the 'focal point' of the press release").

the forum state; it is enough if the target has "a significant connection to the forum." App. 23a.

To summarize, at least six circuits—the Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits—have held that an allegation that the defendant committed an intentional act directed at a known forum resident is not enough to satisfy *Calder*'s express-aiming requirement; rather, the forum state itself must be the focal point of the defendant's conduct. Two circuits—the Ninth and Eleventh Circuits—have concluded that such targeting of a known forum resident is enough to establish express aiming under *Calder*.

This split is deep and square. Most circuits recognize that there is a difference between aiming conduct at a person who happens to be a resident of a given state and aiming conduct at that state itself. Yet the Ninth Circuit equated these distinct concepts: "Walden intentionally targeted persons and funds with substantial connections to Nevada. He thus expressly aimed his conduct at that state, providing a sufficient basis for personal jurisdiction." App. 47a. If petitioner had engaged in the same alleged conduct with respect to a passenger transiting through the Atlanta airport on the way home to (say) Missouri, the passenger could not sue petitioner in Missouri. The Eighth Circuit would reject such a suit on the ground that petitioner's conduct may have been "aimed at the [passenger]," but it was not aimed at Missouri itself. *Johnson*, 614 F.3d at 796. The same is true for passengers transiting through distant airports on the way home to any of the other 27 states in circuits where the

majority interpretation prevails. But would-be plaintiffs with "significant connections" to states within the Ninth and Eleventh Circuits can force law enforcement officers to defend their good names and personal finances in distant forums in which they have never set foot, taken any action, or directed anyone to take any action.

B. The Ninth Circuit Erred in Finding the Express-Aiming Test Satisfied

The Ninth Circuit is on the short side of this circuit split for good reason: its approach is fundamentally inconsistent with due-process requirements and this Court's opinion in *Calder*.

As previously explained, the lower courts have uniformly concluded that *Calder* imposes three distinct requirements. First, the plaintiff must allege "an intentional action" by the defendant; second, that action must have been "expressly aimed at the forum state"; and third, the defendant must have acted "with knowledge that the brunt of the injury would be felt in the forum state." *E.g.*, *Dudnikov*, 514 F.3d at 1072; see also, *e.g.*, *Johnson*, 614 F.3d at 796; *Imo Indus.*, 155 F.3d at 256.

The Ninth Circuit paid lip service to *Calder*'s "three-part test" in the ruling below. App. 9a. But that was where that court's adherence to *Calder* ended. By equating express aiming with an "action[] taken outside the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections," App. 17a–18a, the Ninth Circuit for all intents and purposes eliminated the express-aiming requirement. Whenever a plaintiff

alleges that a defendant commited an intentional act aimed at the plaintiff with the knowledge that it will harm the plaintiff in the forum state—*i.e.*, whenever the plaintiff can meet the first and third prongs of *Calder*'s three-prong test—the Ninth Circuit would necessarily conclude that the second part of *Calder*'s test, the express-aiming test, was also satisfied. *Calder*'s three requirements thus collapse into two.

That cannot be the law. If it were, the Court in *Calder* would not have emphasized that the defamatory article was "drawn from California sources" and concerned the plaintiff's "California activities," or that the plaintiff's "career was centered in California." 465 U.S. at 788. Likewise, if the location of the plaintiff's harm were all that mattered, the Court would not have stressed that "California [was] the focal point *both of the story and of the harm suffered*," *id.* at 789 (emphasis added); that California was the focal point of the harm alone would have sufficed. For this reason, other courts—such as the Third Circuit—have explained that, to satisfy *Calder*, the forum state must be "the focal point of the *harm* suffered by the plaintiff as a result of the tort" *and* "the focal point of the tortious *activity*." *Imo Indus.*, 155 F.3d at 256 (emphasis added). *Calder*'s three-part test really does have three parts, and the Ninth Circuit's collapsing of the second and third parts is erroneous. See App. 47a.

The Ninth Circuit's analysis is also fundamentally inconsistent with time-honored due-process precepts. The Ninth Circuit's approach makes personal jurisdiction dependent entirely on the extent to which the defendant foresaw that his

actions would harm the plaintiff in the forum state. But "[a]lthough it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there . . . the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295); see also *J. McIntyre.*, 131 S. Ct. at 2789 (plurality op.) ("This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."). Instead, the defendant must have purposefully directed his actions toward the forum. See *Burger King*, 471 U.S. at 472–75. As Judge McKeown forcefully argued below, the Ninth Circuit has, "[w]ith the stroke of a pen, . . . return[ed] to a discredited era of specific personal jurisdiction, where foreseeability reigns supreme and purposeful direction is irrelevant." App. 91a.

Nor can the Ninth Circuit's approach be reconciled with first principles. "[J]urisdiction is in the first instance a question of authority." *J. McIntyre*, 131 S. Ct. at 2789 (plurality op.). Due process restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

For that reason, courts must ask whether there is "a sufficient connection between the defendant *and the forum State.*" *Kulko v. Super. Ct. of Cal.*, 436 U.S.

84, 91 (1978) (emphasis added). It makes no sense instead to focus (as the Ninth Circuit did) on "the possibly incidental and constitutionally irrelevant effects of th[e defendant's] conduct *on the plaintiff*." *Mobile Anesthesiologists*, 623 F.3d at 445 n.1 (emphasis added). The defendant's contacts with the plaintiff are of course relevant to the merits of the plaintiff's claim against the defendant, but it is the defendant's contacts with the state that determine whether the state's courts have power to hear the plaintiff's claim against him.

For all these reasons, the Ninth Circuit's "virtually limitless expansion of personal jurisdiction runs afoul of both due process guarantees and Supreme Court precedent." App. 91a (McKeown, J., dissenting). This Court should grant the petition to correct the Ninth Circuit's erroneous approach to personal jurisdiction.

C. The Issue is Important

The personal-jurisdiction issue is important and worthy of this Court's review. Under the Ninth Circuit's rule, law enforcement officers who police airports and border crossings are subject to jurisdiction anywhere in the country. A plaintiff who comes into contact with the officer need allege only that (a) the officer knew the plaintiff had connections to the forum state and (b) the officer intentionally harmed that plaintiff in some way. As Judge Ikuta put it, "there are no effective limits to the majority's reasoning: all the airport officials who interacted with Fiore and Gipson in Atlanta have potentially subjected themselves to the judicial power of Nevada." App. 63a.

For example, a Transportation Security Administration officer who checks a traveler's driver's license and refuses to allow the traveler access to a secure area or requires the traveler to undergo heightened security screening could be sued anywhere, so long as the plaintiff alleges that the officer acted intentionally. By virtue of examining the plaintiff's driver's license, the officer will know the plaintiff's state of residence and will thus know that the plaintiff has a "significant connection" to that state, thereby satisfying the Ninth Circuit's test. App. 23a.

This will create serious problems for law enforcement. It is unfair to officers to make them defend themselves in far-flung forums in circumstances where the forum state is in no way the focal point of their alleged conduct. The due process clause "protects the defendant against the burdens of litigating in a distant or inconvenient forum," *World-Wide Volkswagen*, 444 U.S. at 292, and those who keep our country safe surely deserve that protection.

The Ninth Circuit brushed aside these concerns, reasoning that the burden on petitioner of having to defend this suit thousands of miles from home is minimal because he initially received free representation by the U.S. Department of Justice, "the world's largest law firm with offices in all fifty states." App. 33a (internal quotation marks omitted). As this petition illustrates, however, *Bivens* defendants do not necessarily receive DOJ representation at all stages of a case or for all purposes, and DOJ representation is never an entitlement, see 28 C.F.R. §§ 50.15, 50.16.

In all events, that DOJ representation is sometimes available cannot mean that *Bivens* defendants are not entitled to the protections of the Due Process Clause. *Bivens* claims, after all, are personal-capacity claims against the officer as an individual, not against the United States or the officer's employing agency. Suits like respondents' threaten officers' personal finances and their good names. Officers sued personally have a personal interest in being able to defend themselves, and the Ninth Circuit went far astray in suggesting that DOJ will take care of everything and petitioner need not be concerned about where he can be sued.[7]

Moreover, the Ninth Circuit ignored the fact that its interpretation of express aiming is in no way limited to *federal* law enforcement officers. State and local officers who interact with travelers now also must fear being haled into distant forums in suits brought under 42 U.S.C. § 1983, which are far more numerous than *Bivens* suits. These defendants cannot rely on "the world's largest law firm with offices in all fifty states," App. 33a; the burden the Ninth Circuit's ruling places on them is immense.

Nor, indeed, is the Ninth Circuit's interpretation limited to law enforcement officers at all. If a defendant's knowledge that an action will have effects on a person with connections to a distant forum is enough to subject that defendant to personal

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[7] Although the pernicious effects of the Ninth Circuit's interpretation on federal law enforcement officers should be apparent from the decision below, if the Court has any doubt on that score it should call for the views of the Solicitor General.

jurisdiction, then many people could be sued in places where they never expected to be haled into court and where defense of a suit would pose significant hardship. For example, under the Ninth Circuit's rule, a blogger can be sued for defamation if he knows, when he writes an allegedly defamatory post, that the subject has connections to a particular state. This goes far beyond *Calder*—which is exactly why other courts, confronted with similar facts, have concluded that personal jurisdiction was lacking. See, *e.g.*, *Johnson*, 614 F.3d at 796 (holding that an allegedly defamatory posting on an Internet message board was not expressly aimed at the plaintiff's home state).

For all these reasons, the personal jurisdiction issue presented is of great importance, and this Court should grant the petition to resolve it.

D. This Case is a Good Vehicle

This case is also a good vehicle for review of this important constitutional issue. The circuit split over what *Calder*'s express-aiming requirement means is dispositive here. Petitioner has *no* connections to Nevada other than that he allegedly committed an intentional tort against respondents knowing that *they* had connections to Nevada. Under the approach followed by the majority of circuits, respondents could not have obtained jurisdiction over petitioner in Nevada.

As alleged by respondents, petitioner knew that respondents had connections to Nevada when he prepared an allegedly false affidavit in support of forfeiture of funds that had been seized from

respondents in Georgia. This alleged conduct may have been targeted at respondents, but there is nothing to suggest that it was targeted *at Nevada*. Nor did the Ninth Circuit even try to argue otherwise; it instead stressed only that petitioner "must have known and intended that his actions would have impacts *outside Atlanta*" and that he "expressly aimed his actions at people and property he knew from the outset were *not* local." App. 20a (first emphasis added); see also App. 47a.

On these facts, the Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits would surely conclude that the express-aiming requirement was not satisfied. Respondents' allegations simply do not show that Nevada itself was both the "focal point of the harm suffered by the plaintiff as a result of the tort" and "the focal point of the tortious activity." *E.g., Imo Indus.*, 155 F.3d at 256. To the contrary, respondents' only hope for jurisdiction over petitioner in Nevada is to eliminate the latter requirement. Thus, while in some cases it might be unclear whether the different express-aiming tests make a difference, here it is quite clear that they do.

Moreover, this petition arises from a ruling on a motion to dismiss and thus comes free of any evidentiary complications. Nor are there any other obstacles to review. Although there was disagreement below over whether respondents' complaint included a separate claim related to the false affidavit allegation, petitioner does not contest the majority's characterization of the complaint in this Court. The split between the Ninth and Eleventh Circuits, on the one hand, and the Third, Fourth,

Fifth, Seventh, Eighth, and Tenth Circuits, on the other, is therefore cleanly presented for this Court's review in a case where the answer to the question presented will plainly dictate the outcome. Nor, with most circuits having addressed the issue, is there any need for further percolation. Finally, there is no reasonable prospect that the split will resolve itself without this Court's intervention. The Ninth Circuit reaffirmed and indeed extended its prior case law in the decision below, and did so despite forceful dissents from the denial of rehearing. And the Eleventh Circuit is aligned with the Ninth Circuit. Accordingly, this Court should grant the petition to resolve this important personal-jurisdiction issue.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE PLACE OF A PLAINTIFF'S INJURY IS A PROPER VENUE EVEN IF THE DEFENDANT'S ALLEGED ACTS AND OMISSIONS ALL OCCURRED ELSEWHERE

In addition to ruling that Nevada was a proper forum for personal jurisdiction purposes, the court below also ruled that Nevada was an appropriate venue under 28 U.S.C. § 1391(b)(2). This Court should grant review to address that issue as well.[8]

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[8] There is no "mandatory sequencing" for judicial consideration of preliminary, non-merits issues. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotation marks omitted). Where objections are raised as to both venue and personal jurisdiction, a court may address either issue first. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180–81 (1979) (deciding venue issue and passing over personal

1. As relevant here, § 1391(b)(2) provides that "[a] civil action . . . may be brought in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Relying on circuit precedent, the Ninth Circuit reasoned that in "a tort action, the locus of the injury is a relevant factor" in determining venue under § 1391(b)(2). App. 41a (quoting *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001)). Applying that standard, the court held that venue was proper because respondents "suffered harm in Nevada," emphasizing that "[a]ll the economic injuries suffered by [respondents] were realized in Nevada." *Id.*

This holding exacerbated a circuit split. Other circuits disagree that the district in which the plaintiff is injured is "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Instead, at least three circuits have held that a court should look to the district or districts in which the alleged acts or omissions *by the defendant* took place.

The leading case is *Woodke v. Dahm*, 70 F.3d 983 (8th Cir. 1995). In *Woodke*, the plaintiff designed and sold trailers bearing his registered trademark. He alleged that the defendants engaged in "reverse passing off" by publishing an advertisement that depicted one of his trailers with the trademark

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jurisdiction issue). Petitioner submits that both the venue and personal-jurisdiction issues raised here warrant review. At the same time, however, the Ninth Circuit's judgment could be reversed on either ground, and this Court thus could grant certiorari limited to either one of the questions presented.

removed. *Id.* at 985. The newspaper in which the allegedly offending advertisement was published was not circulated in Iowa. The plaintiff nonetheless filed suit in the Northern District of Iowa, where he resided, arguing that venue was proper "in the district of his residency because that [was] the location of the ultimate effect of" the alleged conduct. *Id.*

The Eighth Circuit decisively rejected that argument, concluding that it "would work a transformation of the venue statute that Congress could not have intended." *Id.* Instead, it was "far more likely that by referring to 'events or omissions giving rise to the claim,' Congress meant to require courts to focus on relevant activities of the defendant, not of the plaintiff." *Id.*

The Eleventh Circuit followed the same course in *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366 (2003). There, an Alabama-based plaintiff sued in the Middle District of Alabama to enforce a non-compete agreement against a former employee who was working for one of the plaintiff's competitors in Georgia. The Eleventh Circuit concluded that venue did not lie in the Middle District of Alabama. Explicitly approving the Eighth Circuit's *Woodke* decision, the Eleventh Circuit held that "[o]nly the events that directly give rise to a claim are relevant." *Id.* at 1371.[9]

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[9] *Jenkins Brick* involved an earlier version of § 1391 in which venue for federal-question and diversity cases was addressed in separate provisions. The language that the Eleventh Circuit

The Second Circuit also has adopted the Eighth and Eleventh Circuits' holdings that only the defendant's acts and omissions are relevant under § 1391(b)(2). In *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005), the court relied on both *Jenkins Brick* and *Woodke* in agreeing that § 1391(b)(2) requires "asking (1) 'What acts or omissions by [defendant] gave rise to [plaintiff's] claim?' and (2) 'Of those acts, did a 'substantial part' of them take place in [the chosen venue]?'" *Id.* at 432 (quoting *Jenkins Brick*, 321 F.3d at 1372) (alterations added by Second Circuit). The Second Circuit then held that venue was improper because "[p]laintiffs allege a series of actions by defendants to support their antitrust claims" and "the vast majority of these acts occurred outside the Western District of New York." *Id.* at 434; see also *id.* at 431 n.18.

There is thus at least a three-to-one circuit split over whether § 1391(b)(2) permits venue to lie where the plaintiff was injured or, rather, where the defendant's challenged acts or omissions occurred.

2. The Ninth Circuit's interpretation of § 1391(b)(2) is wrong; the approach of the Second, Eighth, and Eleventh Circuits is correct. The text of § 1391(b)(2) speaks of "events or omissions giving rise to the claim." It thus allows consideration of only acts ("events") or failures to act ("omissions") *by the defendant*; the location of the harm to the plaintiff is

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considered in what was then § 1391(a)(2) is identical to the relevant language of § 1391(b)(2) today.

irrelevant. As the Eighth Circuit explained, "it is not easy to know how *a plaintiff's* 'omissions' could ever be relevant to whether a claim has arisen. . . . [I]f Congress had wanted to lay venue where the plaintiff was residing when he was injured, it could have said so expressly." *Woodke*, 70 F.3d at 985.

Indeed, it is clear that Congress knows how to make venue dependent on the plaintiff's residence. Congress provided that venue for certain claims against the United States can be brought "in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b). And where an officer of the United States is sued in his official capacity, Congress provided for venue "in any judicial district in which . . . the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1)(C). That Congress declined similarly to add the location of the plaintiff's residence as an option for venue in § 1391(b)(2) provides strong evidence that it did not intend courts to focus on the plaintiff when determining venue under that provision.

Moreover, this Court has explained that permitting venue to lie wherever the impact of the defendant's action is felt would make no sense because "the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183–84 (1979) (emphasis in original). In *Leroy* this Court construed an earlier version of § 1391(b), which permitted venue "in the judicial district . . . in which the claim arose." *Id.* at 178 n.8. The Court

explained that reading the statute to lay venue in the location of the "impact" on the plaintiff would have been "inconsistent with the underlying purpose of the provision . . . ." *Id.* at 186.

That the place of injury is not a proper venue is all the more clear now after the statute's amendment. Even if some tort claims could conceivably be said to "ar[i]se" in the place of the injury even if the defendant acted elsewhere, the statute now focuses on the "events or omissions giving rise to the claim," which are *the defendant's* acts or omissions. And certainly there is no indication that Congress amended § 1391(b) because it was unhappy with *Leroy* or sought to break with the normal purpose of statutory venue provisions, namely, to protect *defendants*. To the contrary, Congress amended § 1391(b) because "it was oftentimes difficult to pinpoint the single district in which a 'claim arose,'" as the prior version seemingly required; Congress therefore authorized venue in multiple districts in cases where "a substantial part of the events or omissions giving rise to the claim" occurred in multiple districts. *Jenkins Brick*, 321 F.3d at 1371. As the Eleventh Circuit explained, "[t]he new language . . . does not mean, however, that the amended statute no longer emphasizes the importance of the place where the wrong has been committed." *Id.*

3. The venue issue is important for many of the same reasons that the first question presented is important. The Ninth Circuit's venue holding—like its personal-jurisdiction holding—subjects defendants to suit in distant locales with little or no

connection to the events giving rise to the suit. See *supra* Section I.C. In *Leroy*, this Court warned that basing venue on the location of the plaintiff's injury would mean that defendants who interact with people from across the country "would [be] subject . . . to suit in almost every district in the country." 443 U.S. at 186. This Court thus rejected that injury-centered approach, but the Ninth Circuit has since adopted it. And because § 1391(b)(2) applies to all civil actions, the ruling below will affect a wide array of cases in the nation's largest circuit.

4. This case is an ideal vehicle to resolve this issue. It is undisputed that *all* the alleged acts by petitioner that give rise to respondents' claims took place in Georgia. Whether venue is proper in Nevada thus turns entirely on whether the Ninth Circuit is correct to focus on the locus of the plaintiff's injury. Under the Eighth Circuit's approach—which two other circuits follow—venue could not lie in Nevada even if is the "location of the ultimate effect" of the allegedly tortious acts committed by petitioner in Georgia. *Woodke*, 70 F.3d at 985.

In summary, the Ninth Circuit's venue ruling, like its personal-jurisdiction ruling, exacerbates a circuit split on an important issue of federal law worthy of this Court's review and cleanly presented by this petition.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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November 6, 2012

APPENDIX

TABLE OF APPENDICES

Appendix A

Amended Opinion of the United States Court of Appeals for the Ninth Circuit (Filed Sept. 12, 2011, Amended Aug. 8, 2012) 1a

Appendix B

Order of the United States District Court for the District of Nevada (Dkt. No. 23, Oct. 17, 2008) 65a

Appendix C

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc (Aug. 8, 2012) 75a

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-17558

GINA FIORE; KEITH GIPSON,

Plaintiffs-Appellants,

v.

ANTHONY WALDEN; UNKNOWN AGENTS OF THE FEDERAL GOVERMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada,
D.C. No. 2:07-cv-01674-ECR-LRL
Edward C. Reed, Senior District Judge

AMENDED OPINION

Before: Alfred T. Goodwin, Marsha S. Berzon and Sandra S. Ikuta, Circuit Judges.

Argued and Submitted: Feb. 12, 2010
Filed: Sept. 12, 2011, Amended Aug. 8, 2012

OPINION

BERZON, Circuit Judge:

Federal law enforcement officers seized funds from passengers who were temporarily in the Atlanta airport changing planes. The travelers, Gina Fiore and Keith Gipson, explained that the funds were legal gambling proceeds, not evidence of drug transactions. Their story turned out to be true. Fiore and Gipson claim the seizure and later efforts to institute forfeiture proceedings were unconstitutional. They sued in Las Vegas, where they were heading, lived at least part time, and suffered the inconvenience of arriving with absolutely no money, as well as other financial injuries. The district court dismissed this *Bivens*[1] action against the federal officers for lack of personal jurisdiction. We reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

In July and August of 2006, Fiore and Gipson, professional gamblers, traveled from Las Vegas, Nevada, where both maintained residences, to casinos in Atlantic City, New Jersey, and San Juan, Puerto Rico, before returning to Las Vegas.[2] On their

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] The facts are taken from Fiore and Gipson's first amended complaint and from a declaration by the defendant. Of course, at this preliminary stage, we do not know whether any of the facts alleged in the complaint are true, but simply assume that they are. *See Brayton Purcell LLP v. Recordon & Recordon*,

return trip on August 8, 2006, they left from San Juan, boarded a connecting flight in Atlanta, Georgia, and then flew to Las Vegas, their final destination.

In San Juan, an agricultural x-ray inspection and other additional screening showed no contraband in Fiore's or Gipson's luggage. At a Transportation Security Administration (TSA) checkpoint, Fiore and Gipson were subjected to heightened security procedures because they were traveling on one-way tickets. They were screened for minute traces of illegal drugs; none was found. Search of their carry-on bags revealed approximately $48,000 in Gipson's carry-on bag and $34,000 in Fiore's carry-on bag, all carried openly. Gipson also had approximately $15,000 on his person. These funds, totaling approximately $97,000 in United States currency, included approximately $30,000 in seed money for gambling — their "traveling bank" — brought with them from Las Vegas.[3]

After this cash was discovered, San Juan Drug Enforcement Administration (DEA) Agent Michael Cuento and two other agents arrived and questioned Fiore. Gipson was not questioned directly, but stood by and participated in the conversation. Fiore explained that she and Gipson had been staying and gambling at the El San Juan Casino property. When

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606 F.3d 1124, 1127 (9th Cir. 2010); *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006).

[3] The first amended complaint notes that "Las Vegas [w]as the ordinary static place where [the 'traveling bank' was] situated."

asked for identification, Fiore and Gipson showed their California drivers' licenses and stated that they had California residences, as well as residences in Las Vegas.[4] They further informed the DEA agents "that Las Vegas was the final destination of most if not all of the funds in their possession" and that they were returning to their Las Vegas residences. Agent Cuento escorted Gipson and Fiore to their plane and told them that they might be questioned further in Las Vegas. The two therefore called their attorneys in Las Vegas and arranged to meet them at the airport.

When they arrived at the Atlanta Hartsfield-Jackson International Airport for their connecting flight to Las Vegas, neither Gipson nor Fiore left the transit area near the departure gates. At their gate, DEA Agent Anthony Walden and another DEA agent approached Fiore and began questioning her. Fiore said again that she was not carrying contraband, weapons, or drugs. She explained that she and Gipson were professional advantage gamblers[5] and that the money in their possession was their gambling bank and winnings. In addition, Fiore showed Walden her trip record,[6] which dated back to July 10, 2006, and listed casinos and gaming results.

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[4] According to the complaint, Fiore's and Gipson's residences in Las Vegas are now their permanent residences.

[5] Fiore and Gipson's complaint states that they play "advantage gambling," meaning that they limit their play to legal games, such as poker, in which they have a statistical edge over the casino or other competitors because of their skill.

[6] The complaint explains that "[s]uch logs are kept by professional gamblers as support for tax purposes."

Gipson, sequestered from Fiore for questioning, explained that the documents evidencing that his trip was for gambling were in his checked bag.

After about ten minutes of questioning, another DEA agent arrived in the boarding area with a drug-detecting dog. The dog did not react to Fiore's carry-on bag but pawed Gipson's bag once. The agents informed Fiore and Gipson that the dog's reaction sufficiently signaled contraband to indicate that their money was involved in drug transactions and then seized *all* the funds that Fiore and Gipson had in their possession. Although Fiore and Gipson asked to be allowed at least taxi fare for their arrival in Las Vegas, the agents denied the request. Walden told Fiore and Gipson that if they later produced receipts showing the legitimacy of the funds, their money would be returned. With this understanding, Fiore and Gipson boarded their flight to Las Vegas. When they arrived in Las Vegas, Fiore and Gipson learned that their checked luggage also had been searched in Atlanta.

On August 30, 2006, and September 15, 2006, Fiore and Gipson sent Walden, from Las Vegas, various documents showing the legitimacy of their funds, including federal tax returns demonstrating that they were professional gamblers; the itinerary, hotel records, and receipts from their trip, which showed the legitimacy of their seized money; and a win record on El San Juan Casino letterhead stationery stating that Gipson left the hotel with over $30,000 in winnings immediately before leaving for Las Vegas via Atlanta. Fiore and Gipson asked that

their money be returned to them as Walden had promised.

The funds, however, were not returned to Fiore and Gipson. Instead, the matter was forwarded to DEA headquarters in Virginia for additional investigation.[7] According to the complaint, the DEA's background searches on Fiore and Gipson showed them to be "squeaky clean." Nonetheless, according to the complaint, Walden and another DEA agent provided a false probable cause affidavit to the United States Attorney in the Northern District of Georgia, to assist in bringing a forfeiture action. Specifically, Fiore and Gipson allege in the complaint that this probable cause affidavit falsely stated that Gipson had been uncooperative and had refused to respond to questions; that Fiore and Gipson had given inconsistent answers during questioning; and that there was sufficient evidence for probable cause to forfeit the funds as drug proceeds. Also, according to the complaint, Walden left out exculpatory evidence he knew about when he submitted the affidavit: that Fiore and Gipson had no history of unlawful drug use or trade; that they had documentation showing them to be advantage gamblers; that their bags had passed through an agricultural x-ray and other inspections used for contraband detection without incident; that Fiore

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[7] In his declaration, Walden states that after he seized the cash, he "immediately transferred [it] to a secure location designated to store seized cash" and that "[w]ithin approximately one hour of the seizure, [he] was no longer in possession of the seized cash . [and] did not possess the authority to return the cash" to Fiore and Gipson.

and Gipson had provided actual receipts for most of the funds that they carried; and that the $30,000 Gipson was carrying could be traced directly to a legal source, his winnings at El San Juan Casino.

The case was referred to Assistant United States Attorney (AUSA) Dahil Goss. After determining that Walden had in fact omitted information, with the result that the probable cause affidavit he provided was misleading, Goss concluded that there was no probable cause for the forfeiture of the funds. Goss contacted Fiore and Gipson and offered to return their funds in exchange for a release, presumably of any possible legal claims, but they refused to execute one. Nonetheless, Goss directed the DEA to return Fiore and Gipson's money. The $97,000 was returned to them in Las Vegas on March 1, 2007, nearly seven months after the seizure at the Atlanta airport and six months after Fiore and Gipson had provided Walden with the requested documentation showing the legal source of their funds.

Fiore and Gipson brought a *Bivens* action in the District of Nevada against Walden and three other, unnamed DEA agents or attorneys[8] in their individual capacities, alleging that Walden and the other agents had violated their Fourth Amendment rights by: (1) seizing their money without probable cause; (2) continuing to hold the funds for nearly six months after receiving information conclusively demonstrating the legal source of the cash; (3) knowingly compiling a false and misleading probable

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[8] The unnamed DEA agents or attorneys were never served and are not appellants here.

case affidavit to support a forfeiture action; and (4) referring the matter to the United States Attorney for prosecution on the basis of deficient and/or falsified information, while willfully withholding known exculpatory information.

Walden moved to dismiss for lack of personal jurisdiction, under Fed. R. Civ. P. 12(b)(2), and for improper venue, under Fed. R. Civ. P. 12(b)(3). The district court determined that Walden's search of Fiore's and Gipson's bags and initial seizure of their funds occurred in, and was expressly aimed at, Georgia. Therefore, the district court concluded, there was not personal jurisdiction over Walden in Nevada.[9] The district court did not separately consider whether Walden's actions regarding the allegedly false probable cause affidavit justified personal jurisdiction.

On appeal, Fiore and Gipson challenge dismissal of their case for lack of personal jurisdiction over Walden, the only defendant-appellee. They also argue that Nevada is the appropriate venue. We review de novo a district court's rulings on personal jurisdiction and improper venue. *Brayton Purcell*, 606 F.3d at 1127.

II. DISCUSSION

A. Personal Jurisdiction

[1] "'When subject matter jurisdiction is premised on a federal question, a court may exercise specific jurisdiction over a defendant if a rule or statute authorizes it to do so and the exercise of

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[9] The district court did not address venue.

jurisdiction comports with the constitutional requirement of due process.'" *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1072 (9th Cir. 2001) (quoting *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 589 (9th Cir. 1996)). Where, as here, there is no applicable federal statute governing personal jurisdiction, we look to the law of the state in which the district court sits. *See* Fed. R. Civ. P. 4(k)(1)(A).

[2] Nevada's long-arm statute permits personal jurisdiction over a defendant unless the exercise of jurisdiction would violate due process. *Myers*, 238 F.3d at 1072; *Trump v. Eighth Judicial Dist. Court*, 857 P.2d 740, 747 (Nev. 1993); Nev. Rev. Stat. 14.065(1). Our analysis therefore focuses exclusively on due process considerations. The due process analysis, in turn, centers on whether Walden has "certain minimum contacts" with Nevada, such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Our court uses a three-part test (the *Schwarzenegger* test) for determining specific personal jurisdiction — that is, personal jurisdiction premised on the particular circumstances underlying the lawsuit sought to be litigated:[10]

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[10] There is no general jurisdiction over Walden, as he had no "continuous and systematic contacts" with Nevada. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *see also Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004).

> (1) The non-resident defendant must *purposefully direct his activities* or consummate some transaction *with the forum or resident thereof*; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's *forum-related activities*; and
>
> (3) the *exercise of jurisdiction* must comport with fair play and substantial justice, i.e. it *must be reasonable.*

Schwarzenegger, 374 F.3d at 802 (citation and internal quotation marks omitted) (emphases added).

B. Operative Facts

In response to Fiore and Gipson's first amended complaint, Walden moved to dismiss for lack of personal jurisdiction and improper venue. His motion included a declaration stating that he was a police officer for the City of Covington, Georgia, and was deputized as a federal narcotics investigator assigned to the DEA Task Force Group 1 at the Atlanta airport. The purpose of the task force was to interdict illegal drugs, seize the drugs and any proceeds found, and prosecute individuals transporting illegal drugs or drug proceeds. Walden also stated that (1) he is a Georgia resident who had never resided, owned property, conducted business, or even been in Nevada; (2) he intercepted Fiore and Gipson at the Atlanta airport after he was informed by San Juan

law enforcement officers that Fiore and Gipson had boarded a plane to Atlanta en route to their final destination, Las Vegas, Nevada; (3) when he asked plaintiffs for identification, they presented drivers' licenses that "were not issued by the State of Nevada"; (4) after the seizure, Walden and the other DEA agents "immediately transferred the seized cash to a secure location" for storage; (5) "[w]ithin approximately one hour of the seizure, [Walden] was no longer in possession of the seized cash"; and (6) Walden "did not possess the authority to return the cash to [Fiore and Gipson] once it was seized."[11] Walden stated that he seized the funds because of concern that Fiore and Gipson had approximately $97,000 in their possession and lacked sufficient documentation to substantiate the legitimacy of the funds. He further declared that he did not contact Fiore and Gipson's attorney or anyone else in Nevada to verify their explanations about the sources of the funds.

The district court did not conduct an evidentiary hearing regarding personal jurisdiction.[12]

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[11] Federal regulations confirm that Walden did not have legal authority to return the money seized from Fiore and Gipson. *See* 21 C.F.R. §§ 1316.72-1316.73 (detailing requirements for storage of property "subject to seizure" and specifying Special Agents-in-Charge — not deputized local police such as Walden — as the officials "designated . . to receive and maintain" seized property); *see* 21 C.F.R. § 1316.71(e) (defining "Special Agents-in-Charge" as DEA Special or Resident Agents-in- Charge and Federal Bureau of Investigation Special Agents-in-Charge).

[12] As far as appears in the record, Walden did not request an evidentiary hearing.

Consequently, "the plaintiff need only make 'a prima facie showing of jurisdictional facts to withstand the motion to dismiss.'"[13] *Brayton Purcell*, 606 F.3d at 1127 (quoting *Pebble Beach*, 453 F.3d at 1154). "'[U]ncontroverted allegations in plaintiff's complaint must be taken as true,'" *id.* (quoting *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002)) (alteration omitted), and, in deciding whether a prima facie showing has been made, "the court resolves all disputed facts in favor of the plaintiff." *Pebble Beach*, 453 F.3d at 1154. Nonetheless, "mere 'bare bones' assertions of minimum contacts with the forum or legal conclusions unsupported by specific factual allegations will not satisfy a plaintiff's pleading burden." *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007).

[3] In determining whether there is personal jurisdiction, we have drawn inferences from the facts alleged in the complaint, but have not expressly addressed the standard for doing so.[14] Other circuits

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[13] "If the plaintiff succeeds in meeting that prima facie burden, then the district court may still order an evidentiary hearing or the matter may be brought up again at trial." *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n.1 (9th Cir. 1990).

[14] *See CE Distrib., LLC v. New Sensor Corp.*, 380 F.3d 1107, 1111 (9th Cir. 2004) (holding that it is "reasonable to infer" that the defendant knew its actions "would resonate in Arizona" because it knew that plaintiff was based in Arizona); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1320 (9th Cir. 1998) (holding that licensing agreements and other documents with California companies "g[a]ve rise to a strong inference" that defendants conducted negotiations with California companies, possibly in California).

have been more explicit than we have about the authority to draw reasonable inferences in favor of the plaintiff in determining whether the plaintiff has made a prima facie showing of personal jurisdiction over the defendant.[15] At the same time, the federal courts of appeal do not draw unreasonable or far-fetched inferences in favor of the plaintiff.[16]

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[15] *See Noonan v. Winston Co.*, 135 F.3d 85, 89 (1st Cir. 1998) ("Because the district court dismissed plaintiffs' claims without holding an evidentiary hearing, we review the rulings *de novo*, construing all inferences in the plaintiffs' favor."); *New Wellington v. Flagship Resort Dev.*, 416 F.3d 290, 294 (4th Cir. 2005) ("[C]ourts 'must construe all relevant pleading allegations in the light most favorable to the plaintiff, assume credibility, and draw the most favorable inferences for the existence of jurisdiction.'" (quoting *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989))); *GCIU-Emp'r Ret. Fund v. Goldfarb Corp.*, 535 F.3d 1018, 1020 n.1 (7th Cir. 2009) ("In reciting the facts, we read the complaint liberally with every inference drawn in favor of plaintiff and resolve all factual disputes in favor of plaintiff."); *Steinbuch v. Cutler*, 518 F.3d 580, 585 (8th Cir. 2008) ("To survive a motion to dismiss, the plaintiff must state sufficient facts in the complaint to support a reasonable inference that defendants may be subjected to jurisdiction in the forum state."); *Fraser v. Smith*, 594 F.3d 842, 846 (11th Cir. 2010) ("We accept factual allegations in the complaint as true to the extent that they are uncontested and, in cases of conflict, construe all reasonable inferences in the plaintiffs' favor."); *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334, 1338 (Fed. Cir. 2006) ("In reviewing the [personal jurisdiction] decision, we accept a plaintiff's well-pleaded factual allegations as true and draw all reasonable inferences in its favor.").

[16] *See Negron-Torres v. Verizon Commc'ns, Inc.*, 478 F.3d 19, 23 (1st Cir. 2007) ("'[W]e caution that . . . the law does not require us struthiously to credit conclusory allegations or draw far-fetched inferences'" (quoting *Mass. Sch. of Law, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 34 (1st Cir. 1998))); *Robinson v.*

[4] We agree with these various circuits regarding the standard for drawing inferences from the complaint when addressing personal jurisdiction questions: We will draw reasonable inferences from the complaint in favor of the plaintiff where personal jurisdiction is at stake, and will assume credibility. This approach is in line with the pleading standard set forth by the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *See id.* at 1949 ("A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

[5] Here, the key facts in the complaint include Fiore and Gipson's statements that they are Nevada residents; that at the time the funds were seized, they both maintained residences in Las Vegas to which they were returning; and that Walden knew, at least by the time he wrote the probable cause affidavit, that the funds they had on their persons and in their carry on luggage while changing planes

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Overseas Military Sales Corp., 21 F.3d 502 (2d Cir. 1994) ("[W]e will not draw 'argumentative inferences' in the plaintiff's favor"); *Autogenomics, Inc. v. Oxford Gene Tech. Ltd.*, 566 F.3d 1012, 1018 (Fed. Cir. 2009) ("Although we must resolve factual conflicts in [plaintiff's] favor, it is entitled to only those inferences that are reasonable."); *Helmer v. Doletskaya*, 393 F.3d 201, 209 (D.C. Cir. 2004) ("While a district court must resolve all factual disputes in favor of the plaintiff . . . 'the court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint.'" (quoting *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1984))).

in Atlanta were legitimate proceeds of their gambling trade.

C. Application of the *Schwarzenegger* Test

Throughout the ensuing discussion, we concentrate on the false affidavit/forfeiture proceeding aspect of this case, because, as we explain below, we ultimately remand with respect to the initial search and seizure claim, for consideration of the application of the doctrine of pendent personal jurisdiction. *See Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); pp. 8974-75, *infra*.

1. Purposeful Direction

The first part of the *Schwarzenegger* test is subdivided into purposeful direction, which most often applies in tort cases, and purposeful availment, which most often applies in contract cases. 374 F.3d at 802; *see Pebble Beach*, 453 F.3d at 1155. Fiore and Gipson have alleged a tort action,[17] which calls for purposeful direction analysis.

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[17] *Bivens* actions, like the one brought here by Fiore and Gipson, are constitutional tort claims against individual government officials. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *see also Van Strum v. Lawn*, 940 F.2d 406, 408-10 (9th Cir. 1991) (holding that state personal injury statutes of limitations apply to constitutional tort claims brought under *Bivens*); *Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987) (holding that the plaintiff's *Bivens* claim failed because she alleged only state-law tort claims, not constitutional tort claims).

We do not, of course, decide in this personal jurisdiction appeal any merits issues, including whether a *Bivens* action is available and whether any immunities apply. "Whether the

We analyze purposeful direction under the three-part test derived from *Calder v. Jones*, 465 U.S. 783 (1984), commonly referred to as the *Calder*-effects test. *See Brayton Purcell*, 606 F.3d at 1128; *see also Calder*, 465 U.S. at 788-91; *Schwarzenegger*, 374 F.3d at 803. Under the *Calder*-effect test, "'the defendant allegedly must have [(a)] committed an intentional act, [(b)] expressly aimed at the forum state, [(c)] causing harm that the defendant knows is likely to be suffered in the forum state.'" *Brayton Purcell*, 606 F.3d at 1128 (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc)).

[6] "[D]ue process permits the exercise of personal jurisdiction over a defendant who 'purposefully directs' his activities at residents of a forum, even in the 'absence of physical contacts' with the forum." *Schwarzenegger*, 374 F.3d at 803 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (alteration omitted)). Intentional torts, in particular, can support personal jurisdiction over a nonresident defendant who has no other forum

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complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction."); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999) (holding that if a complaint's allegations fail to sufficiently state a claim, such failure is not jurisdictional, but rather cause for dismissal "on the merits under Rule 12(b)(6)").

contacts. *Calder*, 465 U.S. at 790; *see also McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. ___, 2011 WL 2518811 at *4-5 (Jun. 27, 2011) (plurality opinion).

a. Intentional Act

[7] The "intentional act" prong of the *Calder*-effects test is satisfied in this case, as the district court recognized. "We construe 'intent' in the context of the 'intentional act' test as referring to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." *Schwarzenegger*, 374 F.3d at 806. Submitting a false and misleading probable cause affidavit and referring the case for forfeiture proceedings in the absence of probable cause were intentional acts. *See, e.g., Bancroft & Masters, Inc v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000) (sending a letter was an intentional act).

b. Express Aiming

The "express aiming" prong of the *Calder*-effects test presents a more difficult question. The district court reasoned that "Walden's intentional act — the search of Plaintiffs' luggage and seizure of their currency — was expressly aimed at Georgia, not Nevada," because Walden's questioning of Fiore and Gipson, his search of their luggage and his seizure of their money all took place in Georgia. We may assume that is so. But, the district court, as noted, did not consider the false probable cause affidavit aspect of the case, as to which the express aiming prong, we conclude, is satisfied.

[8] In general, where there was "individual targeting" of forum residents — actions taken outside

the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections — we have held the express aiming requirement satisfied. *See Brayton Purcell*, 606 F.3d at 1129-31; *Pebble Beach*, 453 F.3d at 1157; *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002); *Bancroft & Masters*, 223 F.3d at 1087.[18] At the same time, the express aiming requirement is not satisfied where it is merely foreseeable that there will be an impact on individuals in the forum. *Pebble Beach*, 453 F.3d at 1156; *Bancroft & Masters*, 223 F.3d at 1087; *Schwarzenegger*, 374 F.3d at 805.

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[18] Even before *Bancroft & Masters*, the case that made explicit the express aiming prong of the *Calder*-effects test, *see* 223 F.3d at 1087, the case law in this circuit focused on individual targeting of those with known, significant connections to the forum. *See Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (holding that personal jurisdiction existed where "[t]he brunt of the harm . was felt in California," and the defendant "knew Panavision would likely suffer harm there because, although at all relevant times Panavision was a Delaware limited partnership, its principal place of business was in California"); *Gordy v. Daily News, L.P.*, 95 F.3d 829, 833 (9th Cir. 1996) (finding personal jurisdiction where "[t]he prime targeting [arose] . from the fact that [plaintiff was] an individual who live[d] in California"); *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989) (holding that there was personal jurisdiction over a defendant who "knew the injury and harm stemming from his communications would occur in Arizona, where [plaintiff] planned to live and work); *Lake v. Lake*, 817 F.2d 1416, 1423 (9th Cir. 1987) (holding that personal jurisdiction existed where defendant "took . actions for the very purpose of having their consequences felt in the forum state" and where those actions "amount[ed] to more than untargeted negligence").

In *Bancroft & Masters*, we explained that "[t]he presence of individualized targeting is what separates these cases from others in which we have found the effects test unsatisfied." 223 F.3d at 1088. In other words, the difference between those cases in which harm is merely foreseeable in the forum and those in which conduct is "expressly aimed" at the forum is often the difference between an *intended* impact that is either local or undifferentiated, and an *intended* impact that is targeted at a known individual who has a substantial, ongoing connection to the forum.

For example, the maintenance of a passive website did not satisfy the express aiming requirement, even though the website was viewed by forum residents, because there was no "individualized targeting" involved in "merely registering and operating a passive informational website." *Brayton Purcell*, 606 F.3d at 1130. Similarly, there was no express aiming in *Schwarzenegger*, which involved an Ohio car dealership's unauthorized use of Arnold Schwarzenegger's photograph in local advertisements, none of which were circulated in California, the forum in which Schwarzenegger brought suit. 374 F.3d at 799-800. The "express aim was local," as the defendant intended the advertisement at issue to have only local effects. *Id.* at 807. The fact that the advertisement may have had forum effects, such as diminished compensation due to the "over-saturation of [Schwarzenegger's] image," *id.* at 800, was not sufficient to satisfy the express aiming prong. *Id.* at 807.

[9] With respect to the allegedly false affidavit and referral for forfeiture proceedings, the indications that Walden was expressly targeting Fiore and Gipson in Nevada are strong. From the outset, Walden must have known and intended that his actions would have impacts outside Atlanta. Walden confronted Fiore and Gipson at their boarding gate for a plane to Las Vegas, after learning from agents in San Juan that they had just flown from there. So he knew that they were merely changing planes in Atlanta, not staying there. When Walden spoke to them, Fiore and Gipson evidenced no connections whatever to Georgia; they said they were going to Las Vegas, and showed California drivers' licenses. Thus, Walden expressly aimed his actions at people and property he knew from the outset were *not* local.[19] *See id.*

Moreover, on the complaint's allegations, Walden definitely knew, at some point *after* the seizure but *before* providing the alleged false probable cause affidavit, that Fiore and Gipson had a significant connection to Nevada. First, Fiore and Gipson's complaint states that "the funds were readily

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[19] The DEA agents in San Juan had been told about plaintiffs' Nevada connections. Fiore and Gipson's complaint states that they volunteered that they had residences in Las Vegas (now their permanent residences) and California, truthfully provided [the DEA agent] with the additional information concerning their Las Vegas residences, and truthfully indicated that Las Vegas was the final destination of most if not all of the funds in their possession, the originating destination for a substantial part of the currency in their possession, and that they were returning to their residences in Las Vegas.

identifiable [as] originating and returning to Las Vegas as the ordinary static place where they were situated as plaintiffs' bank for gambling." The complaint then goes on to state that "Walden . . told plaintiffs in no uncertain terms that if they later produced legal receipts demonstrating the legitimacy of the funds, the funds would be returned." Attempting to so demonstrate,

> [u]pon returning to their homes in Las Vegas, plaintiffs marshaled records within Las Vegas to comply with defendant's request and representation . . . On August 30, 2006, plaintiffs forwarded the following to Walden *from Las Vegas*: i. Copies of federal tax returns showing that each plaintiff made their living through gaming; ii. Receipts for their trip; iii. Travel itinerary for the trip; and iv. Hotel records showing that they gambled at such a high level that the casinos would provide them rooms on a complimentary (free) basis.

(emphasis added). At this point, the complaint alleges, "Walden necessarily recognized that in addition to a 'bank' held by Gipson for his seed money in gaming and necessarily originating in Nevada, the seized funds included at least $30,000.00 in cash received from legal gaming win[nings] in Puerto Rico." The complaint also alleges that "[a]ll defendants recognized at all times that the destination of the funds at the time of the seizure was Las Vegas, Nevada, and that a substantial amount of the currency had also originated at Las Vegas, Nevada."

[10] Finally, the complaint alleges that after Fiore and Gipson arrived in Las Vegas, "either Walden or Defendant C, with Walden's acquiessance [sic] and encouragement, searched data bases for background on plaintiffs including data bases compiled and maintained in Nevada," and that "[t]hese searches indicated that the plaintiffs were 'squeaky clean.'" Moreover,

> [a]t the time that the probable cause affidavit was drafted, Walden and defendant C recognized that the funds were not subject to forfeiture and that they had authority and duty to return or cause the return of the seized . . . funds to plaintiffs in Las Vegas. . . [And] any reasonable officer acting in like or similar circumstances would have returned the seized funds to the plaintiffs in Las Vegas.

"Nevertheless, despite demand, despite knowledge of innocence, and despite the duty to return the funds, the funds were not returned to Las Vegas as required." Finally, according to the complaint, the funds ultimately were returned to Fiore and Gipson *in Las Vegas*, by the prosecutor to whom the case had been referred after Walden submitted the false affidavit. Taken together, these allegations indicate that at the time the assertedly false affidavit was composed and filed, Walden recognized that the plaintiffs had significant connections to Nevada, particularly with respect to the funds for which forfeiture was being sought.

For the purposes of personal jurisdiction, it does not matter whether Fiore and Gipson were legal

residents of Nevada or whether they simply had a significant connection to the forum, such that Walden's actions were "'performed with the purpose of having' its 'consequences felt' by someone in [Las Vegas]." *Ibrahim v. Dep't Homeland Sec.*, 538 F.3d 1250, 1259 (9th Cir. 2008); *see also Brainerd*, 873 F.2d at 1259. *Ibrahim*, for example, concerned a woman from Malaysia who had studied at Stanford but was leaving, permanently, on the day of the incident that gave rise to the lawsuit. 538 F.3d at 1253. The defendant, a resident of Virginia who had no ties to California, had from the Transportation Security Intelligence Service's office in Washington, D.C., instructed San Francisco police to detain Ibrahim after her name appeared on the federal government's No-Fly List. *Id.* at 1253, 1258. We held the purposeful impact on Ibrahim in San Francisco sufficient to establish personal jurisdiction over the out-of-state defendant, because it was apparent to the defendant that his order's consequences would be felt in San Francisco. *Id.* at 1258-59. This was so even though the defendant did not initiate the phone call that resulted in him instructing the police in San Francisco to detain Ibrahim. *Id.* at 1258. Whether Ibrahim was a California resident at the time of her detention was not discussed in the case, indicating that her residence did not matter.

Similarly, in *Brainerd*, a defamation case, Brainerd, the plaintiff had accepted a tenured position with the University of Arizona, after which the defendant made defamatory statements about him to his new employer. 873 F.2d at 1258. Whether Brainerd was an Arizona resident at the time the defamatory statements were made was not a factor in

the opinion's analysis. Instead, Brainerd's known connection to Arizona was sufficient to establish personal jurisdiction in Arizona over the defendant, a resident of Canada whose only contacts with Arizona consisted of communications with the University of Arizona regarding the plaintiff. *Id.* at 1258-59. The defendant "knew the injury and harm stemming from his communications would occur in Arizona, where Brainerd *planned* to live and work." *Id.* at 1259 (emphasis added).

In this case, the allegations in the complaint, taken as true for these purposes, establish that Walden necessarily recognized, at least by the time he wrote the probable cause affidavit, that the plaintiffs had a connection to Nevada that was at least as strong as in *Ibrahim*, in which the plaintiff left the forum state the day after the incident giving rise to the suit, never to return, 538 F.3d at 1253, or in *Brainerd*, where the plaintiff only *planned* to live and work in the forum where the injury occurred. 873 F.2d at 1259.

[11] Thus, whether Fiore and Gipson were residents of Nevada at the time of the filing of the false probable cause affidavit is not determinative of the question of personal jurisdiction over Walden. Moreover, as in *Ibrahim* and *Brainerd*, it is not relevant who *initiated* the contacts with Nevada. *See Ibrahim*, 538 F.3d at 1258-59; *Brainerd*, 873 F.2d at 1259. Instead, the critical factor is whether Walden, knowing of Fiore and Gipson's significant connections to Nevada, should be taken to have intended that the consequences of his actions would be felt by them in that state.

As to that issue, our precedents regarding personal jurisdiction in cases concerning fraud or similar causes of action are informative. That case law firmly establishes that if a defendant is alleged to have defrauded or similarly schemed against someone with substantial ties to a forum, the "expressly aimed" factor is met, even if all the defrauding activities occur outside the forum.

In *Bancroft & Masters*, for example, the defendant, a company based in Georgia, sent a letter to the company in Virginia that is the sole registrar of domain names in the United States, allegedly for the purpose of misappropriating a California company's domain name for its own use. 223 F.3d at 1087. This court held that the letter, sent from Georgia to Virginia, "was expressly aimed at California because it individually targeted [plaintiff], a California corporation doing business almost exclusively in California" and "the effects of the letter were primarily felt, as [defendant] knew they would be, in California." *Id.* at 1088.

Similarly, *Metropolitan Life*, decided before this court explicitly adopted the "express aiming" analysis, held that personal jurisdiction existed in California over Geneva Gambrell, an Alabama resident who purposefully defrauded James Neaves, a California resident, by sending a letter to an insurance company representing that Gambrell was entitled to a payment that she knew actually belonged to Neaves. *Id.* at 1064-65. Gambrell sent the letter to the insurance company in California, rather than mailing it to the company's headquarters in New York, but the court explained that the

location to which the letter was mailed did not matter. *Id.* at 1065. What mattered, instead, was that in "address[ing] the envelope to Metropolitan, she was purposefully defrauding Neaves in California." *Id.*

The situation here is similar to those in *Bancroft & Masters* and *Metropolitan Life*. The complaint alleges that Walden fraudulently executed a false and misleading probable cause affidavit, used it to encourage the U.S. Attorney in Georgia to prosecute a forfeiture action, and thereby sought to obtain the funds for the Atlanta DEA.[20] These allegations are analogous to an allegation that Walden attempted to defraud Fiore and Gipson of the seized funds. *See Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1155 (9th Cir. 2005) (listing the elements of fraud under Nevada law). According to the complaint, Walden falsely and with misleading omissions represented in the probable cause affidavit that the Atlanta DEA was entitled to the funds he knew rightfully belonged to Fiore and Gipson, whom he knew had a significant connection to Nevada. And the fraudulent execution of the probable cause affidavit was intended to assist in the retention and eventual forfeiture of Fiore and Gipson's funds, actions which, Walden knew, would have their consequences felt in Las Vegas, *see Ibrahim*, 538 F.3d at 1259, the location to which he knew the funds should rightfully have been returned.

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[20] Had the forfeiture action been successful, the funds would have been transferred "to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property." 21 U.S.C. § 881(e)(1)(A).

Moreover, after Fiore and Gipson forwarded all of their documentation, Walden likely knew, if he did not know before, that Fiore and Gipson were professional gamblers with significant ties to Nevada and that seizing and attempting to keep their "bank" and their earnings would disrupt their business activities in Nevada. *See Bancroft & Masters*, 223 F.3d at 1087 (holding that the express aiming requirement was satisfied when defendant sent a letter to a company in Virginia with the alleged intent and result of disrupting the plaintiff's California business).

In sum, with regard to the filing of the false probable cause affidavit, Walden individually targeted Fiore and Gipson, as he was aware of their significant connection to Nevada and of the likely impact of his defrauding actions on their property and business in Nevada. Under our case law, these facts satisfy the express aiming prong of the *Calder*-effects test.

c. Foreseeable Harm

[12] The final prong of the *Calder*-effects test is the requirement that the conduct at issue caused foreseeable harm in the forum. We "do[ ] not require that the 'brunt' of the harm be suffered in the forum." *Brayton Purcell*, 606 F.3d at 1131 (quoting *Yahoo!*, 433 F.3d at 1207). Instead, the foreseeable-harm "element is satisfied when defendant's intentional act has 'foreseeable effects' in the forum." *Id.* "If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state." *Yahoo!*, 433 F.3d at 1207.

[13] The foreseeable harm factor, thus understood, is readily satisfied here. During their initial encounter, Walden knew from their plane tickets, and from the San Juan DEA agent, that Fiore and Gipson were heading to Las Vegas, along with their $97,000. Moreover, Fiore and Gipson had explained at the airport that they were professional gamblers, and Fiore provided some documentation regarding her funds. After arriving in Nevada, Fiore and Gipson provided additional documentation of the legitimacy and sources of the funds. Consequently, Walden knew, by the time he wrote the fraudulent probable cause affidavit, that the money seized represented their professional earnings. The documentation also demonstrated that he had seized their $30,000 "bank," which they needed to pursue their trade in Nevada. Although the funds were eventually returned to Fiore and Gipson, it is a fair inference from the complaint that the return was delayed while the prosecutor considered whether to go forward with a forfeiture action on the basis of the false probable cause affidavit and sought, unsuccessfully, to forestall a lawsuit such as this one through execution of a release. The delay in returning the funds to Fiore and Gipson in Las Vegas caused them foreseeable harm in Nevada.

* * *

[14] Taken as a whole, then, Fiore and Gipson's complaint satisfies the *Calder*-effects test. The complaint's allegations establish that, by falsifying the probable cause affidavit and attempting to secure permanently for the Atlanta DEA the seized funds, Walden committed (a) intentional acts that (b) individually targeted Fiore and Gipson in Nevada,

and thus were expressly aimed at Nevada, and (c) caused foreseeable harm in Nevada. "An individual injured in [Nevada] need not go to [Georgia] to seek redress from persons who, though remaining in [Georgia] knowingly cause[d] injury in [Nevada]." *Calder*, 465 U.S. at 790. Accordingly, Fiore and Gipson have made a prima facie showing of purposeful direction. *See Brayton Purcell*, 606 F.3d at 1128-31.

2. Forum-Related Conduct

We turn to the second part of the *Schwarzenegger* test: forum-related conduct. 374 F.3d at 802.

This circuit "follows the 'but for' test" to determine forum-related conduct. *Menken v. Emm*, 503 F.3d 1050, 1058 (9th Cir. 2007) (quoting *Myers*, 238 F.3d at 1075). Fiore and Gipson must show that they would not have suffered the alleged injuries in Nevada "but for" Walden's false probable cause affidavit and attempt to facilitate a forfeiture prosecution. *See id.* As in *Menken*, the standard is "easily met" here. *Id.* at 1059.

[15] Fiore and Gipson have alleged that they would not have been deprived of their "bank" and the proceeds of their gambling trip for nearly seven months *but for* the seizure of *all* of their money in Atlanta, combined with Walden's actions that helped delay the return of the funds. Had Walden not filed the false probable cause affidavit, one can infer, the funds would have been returned considerably sooner. The forum-related conduct factor is therefore present.

3. Reasonableness Determination

[16] As Fiore and Gipson have met their burden of satisfying the first two parts of the *Schwarzenegger* test for establishing personal jurisdiction in Nevada, the burden shifts to Walden to satisfy the third part — "'present[ing] a compelling case' that the exercise of jurisdiction would not be reasonable" in Nevada. *Menken*, 503 F.3d at 1057 (quoting *Schwarzenegger*, 374 F.3d at 802). To determine reasonableness, we balance seven factors:

> [(a)] the extent of the defendants' purposeful interjection into the forum state's affairs; [(b)] the burden on the defendant of defending in the forum; [(c)] the extent of conflict with the sovereignty of the defendants' state; [(d)] the forum state's interest in adjudicating the dispute; [(e)] the most efficient judicial resolution of the controversy; [(f)] the importance of the forum to the plaintiff's interest in convenient and effective relief; and [(g)] the existence of an alternative forum.

Id. at 1058 (quoting *CE Distribution, LLC v. New Sensor Corp.*, 380 F.3d 1107, 1112 (9th Cir. 2004)).

a. Extent of Purposeful Interjection into Affairs of Forum State

Regarding the first factor, Walden argues that because the initial search and seizure occurred in Georgia, his actions did not inject him into the affairs of Nevada. We have recognized that circumstances may exist where "the level of purposeful injection into the forum supports a finding of purposeful

availment yet still weighs against the reasonableness of jurisdiction." *Dole Food*, 303 F.3d at 1115. But that hypothetical situation does not exist here.

When Walden sought out Fiore and Gipson at their boarding gate at the Atlanta airport, he knew that their presence in Georgia was fleeting, and that they were going to Nevada. Without probable cause, he seized all of Fiore and Gipson's money, approximately $97,000, which also was destined for Nevada. Even if Walden did not know at the time he seized the funds that Fiore and Gipson had ongoing, substantial connections to Nevada, he necessarily learned of these connections at some point before providing the alleged false probable cause affidavit and referring the case for forfeiture proceedings.

[17] As it turned out, the impact of the intentional torts alleged, which involved taking a large sum of money from Fiore and Gipson, would necessarily have their primary impact where the funds were meant to be kept and used, Nevada. As an airport law enforcement officer, Walden was necessarily aware that his actions would often have their principal impact outside of Georgia, as many of the people he investigates are in Atlanta only on their way to somewhere else.[21] In that sense,

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[21] The Atlanta airport is a major transportation hub. A fact sheet published by the airport states that, since 1998, the Atlanta airport has been the busiest passenger airport *in the world*, with an average of more than 240,000 passengers a day. *See Fact Sheet*, Hartsfield-Jackson Atlanta Int'l Airport (2011), available at http://www.atlanta-airport.com/Passenger/pdf/Fact_Sheet_2011.pdf (last viewed Jul. 13, 2011). In August 2006, the month Fiore and Gipson transferred planes in Atlanta, more than 3.6 million passengers took flights arriving

Walden's job necessitates regularly interjecting himself into affairs of other jurisdictions. By preventing the $97,000 from reaching the intended destination, Nevada, Walden prevented Fiore and Gipson from using their legitimate earnings there, and deprived Nevada banking and the Nevada tax base of the money for a considerable time. In short, although he never stepped foot in Nevada, Walden's "'purposeful interjection into [Nevada] was significant.'" *Ibrahim*, 538 F.3d at 1259 (quoting *Ziegler v. Indian River County*, 64 F.3d 470, 475 (9th Cir. 1995)).

b. Burden of Defending in the Forum

Concerning the second factor, Walden maintains that he would be burdened because he has never resided, visited, owned property, or conducted business in Nevada. Were Walden a local small business person or an airport employee, his argument might well have force. But in fact, Walden was working as a federal law enforcement officer, which is the only reason he could seize the funds or seek to facilitate their forfeiture.

When federal employees are sued under *Bivens*, the government, as a rule, provides for their defense, and, ultimately, indemnifies them. *See* 28 C.F.R. § 50.15. As Fiore and Gipson pointed out in their brief to this court, Walden appeared in Nevada

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at the Atlanta airport, and approximately the same number boarded flights leaving the Atlanta airport. *See Monthly Airport Traffic Report*, Dep't of Aviation, Hartsfield-Jackson Atlanta Int'l Airport (Aug. 2006), available at http://www.atlantaairport.com/docs/Traffic/200608.pdf (last viewed Jul. 13, 2011).

"represented by the world's largest law firm with offices in all fifty states and providing defense free of charge (The Office of the United States Attorney)." On appeal, Walden is represented by the appellate staff of the Civil Division of the Department of Justice in Washington, D.C., which often appears in this court. Fiore and Gipson, in contrast, had to retain counsel to seek redress for their alleged constitutional injuries. Walden's burden in defending this case is thus small as compared to the likely burden on Fiore and Gipson were the case brought in Georgia. This factor therefore does not weigh in favor of Walden, although it would in all probability weigh in favor of many airport-connected defendants not associated with the federal government.

c. Extent of Conflict with Sovereignty of Defendant's State

The third factor, the extent of conflict with the sovereignty of Georgia, favors Fiore and Gipson. This is a federal action that will be resolved in federal court. The federal government, not Georgia, was the entity on whose behalf the funds were seized and retained. And as Fiore and Gipson have no connection to Georgia, Georgia has no interest in protecting their interests. Consequently, redress of Walden's tortious conduct that injured Nevada residents in Nevada will not "infringe on the sovereignty of [Walden's] home state of [Georgia]." *Ibrahim*, 538 F.3d at 1259.

d. Interest of Forum State in Adjudicating the Dispute

[18] Nevada has "'a strong interest in providing an effective means of redress for its residents who are tortiously injured.'" *Id.* (quoting *Ziegler*, 64 F.3d at 475). Fiore and Gipson are Nevada residents; a substantial portion of their $97,000 that Walden seized originated in Nevada; the money was en route to Nevada when seized; the seized money was destined to enter Nevada's economy and tax base; the money eventually was returned to Fiore and Gipson in Las Vegas, Nevada; and Fiore and Gipson have incurred considerable attorneys' fees in Nevada in securing the return of their unlawfully seized, legitimate earnings and in filing this action to redress the financial injuries they suffered in Nevada. For all these reasons, Nevada has a considerable interest in adjudicating this dispute. *See id.*

e. Most Efficient Resolution of the Controversy

The fifth factor concerns efficiency of the forum, a consideration that turns primarily on the location of witnesses and evidence. *See Menken*, 503 F.3d at 1060-61. Fiore and Gipson represent that their witnesses likely will include: three people from San Juan, Puerto Rico; three from Atlanta, Georgia; one from Quantico, Virginia; and at least Fiore and Gipson from Las Vegas, Nevada. If Walden places at issue Fiore's and Gipson's reputations as proficient, practicing gamblers, additional Nevada witnesses likely will be necessary.

Fiore and Gipson also emphasize that their documentation was generated in and is located in Nevada. These documents, including voluminous records sent to Walden from Nevada, which evidence that Fiore and Gipson are professional gamblers and that the cash in their possession, unremarkable given their trade, did not provide probable cause for Walden's continued seizure and attempted forfeiture of their funds. Moreover, Fiore and Gipson argue that most of the documentation relevant to Walden's actions is located in the Department of Justice in Washington, D.C., in the DEA headquarters in Quantico, Virginia, or in Nevada, not in Georgia.

In contrast, Walden argues only that the witnesses in Georgia are the most important, that the "operative versions" of Fiore and Gipson's documents are "those received by DEA in Georgia."

Overall, this factor is fairly evenly balanced, weighing, if at all, only slightly in favor of Fiore and Gipson.

f. Importance of Forum to Plaintiffs' Convenient and Effective Relief

The sixth factor, the importance of Nevada to Fiore and Gipson's convenient and effective relief, generally is not given much weight in this circuit. *See Dole Food*, 303 F.3d at 1116 (noting that "in this circuit, the plaintiff's convenience is not of paramount importance"). It does, however, weigh in Fiore and Gipson's favor. Fiore and Gipson are Nevada residents; the seizure of their gambling proceeds by Walden occurred as they were changing planes in Georgia, a state to which they appear to

have had no other connection. All of their financial injury was realized in Nevada, which is also the location of their documentation. Fiore and Gipson also have a continuing relationship with a Nevada law firm. For all these reasons, Nevada is a convenient and effective forum for them.

g. Existence of an Alternative Forum

For the reasons given in evaluating the preceding six factors, although Georgia is an available forum in the sense that the suit against Walden could have been brought there, Georgia is not a preferable alternative to Nevada. In addition, at this preliminary stage of proceedings, the parties have not had the benefit of discovery to identify the other DEA employee who made relevant decisions regarding the false affidavit and attempt to instigate forfeiture proceedings while retaining the seized funds. According to the complaint, that individual operated from Virginia. As to him or her, Georgia might not be an available forum, but Nevada would be, for the same reason it is a proper forum for suit against Walden.

[19] Taken as a whole, the seven-factor reasonableness analysis disfavors Georgia as a forum, and, overall, mildly favors Nevada. Walden has not come close to making a "compelling case" that exercise of jurisdiction over him in Nevada would be unreasonable. *See Schwarzenegger*, 374 F.3d at 802.

4. Conclusion

Due process is met when there is "'a degree of predictability to the legal system that allows potential defendants to structure their primary

conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The actions related to the false probable cause affidavit satisfy the express aiming prong, as well as the other requirements for personal jurisdiction. Under *Calder* and *Schwarzenegger*, it is reasonable and comports with traditional notions of fair play and substantial justice for Fiore and Gipson to call Walden to answer in Nevada for those deliberate actions.

That is not to say, and we are not holding, that intentional tortious conduct aimed at a person where he or she is in transit at an airport is sufficient, standing alone, to confer personal jurisdiction over an airport-connected official or employee. In this case, Walden did much more: He individually targeted Fiore and Gipson in Nevada by creating a false and misleading probable cause affidavit and thus illegally seeking to foster the forfeiture of the funds to benefit the Atlanta DEA. His conduct in doing so was expressly aimed at Nevada because at that point, if not before, he knew that Fiore and Gipson had ongoing and substantial connections to Nevada. If, as alleged, he also knew that there was no legitimate reason to seek forfeiture of the funds, his actions amounted to an attempt to defraud Nevada residents. Moreover, the traditional weight given to a defendant's inconvenience in having to litigate in a forum in which he has few contacts does not apply in this case, given that Walden can be represented just as easily by the United States

Attorney's Office in Nevada as by the Office in Georgia.

[20] Under these circumstances, the district court erred in concluding that it lacked personal jurisdiction over Walden, at least as to the portion of Fiore and Gipson's complaint pertaining to the false probable cause affidavit and resulting delay in returning the funds.

C. Pendent Personal Jurisdiction

Under our case law, the district court may exercise pendant personal jurisdiction over the remainder of Fiore and Gipson's claims even if there would not be personal jurisdiction over them standing alone. *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1181 (9th Cir. 2004). *Action Embroidery* was the first case in this court adopting the doctrine of pendent personal jurisdiction, *id.* at 1181, under which "a court may assert . . . jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction." *Id.* at 1180. The facts underlying a particular claim need not exactly track the facts underlying the claims for which there is personal jurisdiction, so long as the core facts are the same. *See CE Distrib.*, 380 F.3d at 1113-14.[22]

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[22] In *CE Distribution*, this court approvingly cited a Seventh Circuit opinion, *Channell v. Citicorp Nat'l Svcs., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996), which noted that only a "loose

Here, the core facts of all of Fiore and Gipson's claims arise out of the same incident: Walden's seizure of their funds at the Atlanta airport. When he seized their funds, Walden knew that Fiore and Gipson were traveling to Las Vegas and that they had no connection to Georgia beyond their transit through the airport. Walden first individually targeted Fiore and Gipson when he confronted them at their gate as they were about to board, and the funds then seized were the same funds as to which forfeiture was sought through the submission of the false affidavit. Further, and critically, the false affidavit was false — or not — in its description of the events at the Atlanta airport surrounding the seizure. So the same facts will have to be developed with regard to the search and seizure and false affidavit claims. Consequently, even if those facts are not sufficient independently to give rise to personal jurisdiction over Walden for the initial seizure, they weigh strongly in favor of the exercise of pendent personal jurisdiction.

In *Action Embroidery*, this court accepted for purposes of the appeal the defendant's contention that there was no personal jurisdiction over state-law claims standing alone, but held that the district court could exercise pendent personal jurisdiction over them. 368 F.3d at 1180. We follow the same course here and remand to the district court "to decide whether to retain or dismiss the pendent [search and seizure] claims." *Id.* at 1181.

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factual connection between the claims" is necessary for the purposes of pendent jurisdiction. *CE Distrib.*, 380 F.3d at 1114.

D. Venue

Although Walden raised the defense of improper venue in the district court, the issue was not addressed once the court determined that there was no personal jurisdiction over Walden in Nevada. Because we have concluded otherwise, we also consider his defense of improper venue, which he pursues on appeal.

The controlling statute provides in relevant part: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . *a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.*" 28 U.S.C. § 1391(b)(2) (emphasis added). Walden contends that Nevada is an improper venue for this action because it has no relationship to the event about the seizure of Fiore and Gipson's $97,000 at the Atlanta airport.[23]

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[23] Walden relies on *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), and *Sutain v. Shapiro & Lieberman*, 678 F.2d 115 (9th Cir. 1982) in arguing that Fiore and Gipson cannot establish venue under 28 U.S.C. § 1391(b)(2). Both of these cases, however, addressed § 1391(b) as it read before amendments contained in the present version. Those amendments changed language that had limited venue to districts "in which the claim arose," to provide that venue lies where "a substantial part of the events or omissions giving rise to the claim occurred." We have recognized this distinction and noted that *Leroy* no longer can be used as Walden maintains. *Newton v. Thomason*, 22 F.3d 1455, 1464 & n.8 (9th Cir. 1994). Moreover, in *Sutain*, the only event that occurred in the forum in question was the appearance of a partner of the defendant accounting firm in Tax Court, in response to a subpoena. 678

"[I]n a tort action, the locus of the injury [is] a relevant factor" in making this determination. *Myers*, 238 F.3d at 1076. In *Myers*, the fact that "at least one of the 'harms' suffered by Plaintiffs . . . was felt in Nevada" was sufficient to make venue proper in Nevada. *Id.* Fiore and Gipson similarly suffered harm in Nevada. All the economic injuries suffered by Fiore and Gipson were realized in Nevada, including their loss of use and interest on the funds for nearly seven months. The facts concerning the origin and legitimacy of the $97,000 are also connected to Nevada: The $30,000 "bank" originated in Nevada; Walden fabricated a fraudulent probable cause affidavit to institute forfeiture proceedings against Fiore and Gipson after they had returned to

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F.2d at 117. That such an event was "not 'substantial' for the purposes of" establishing venue, *id.*, does not undermine our conclusions in this case.

Walden also urges us to rely on *Stafford v. Briggs*, 444 U.S. 527 (1980), which held that 28 U.S.C. § 1391(e), addressing venue in civil actions against officers of the United States acting in their official capacity, could not be read to allow suits against individual officers for money damages to go forward in any federal district in the country because to do so "would place federal officers . . . in a very different posture in personal damages suits from that of all other persons." *Id.* at 544. Walden's argument that finding venue proper in Nevada in this case would similarly result in a precedent that allowed any law enforcement officer working in a transportation hub to be sued in any forum in the country is contradicted by our earlier analysis regarding personal jurisdiction. Moreover, Fiore and Gipson do not maintain, and we are not holding, that law enforcement officers who work at transportation hubs are subject to nationwide venue because of their status. For venue to lie, the terms of § 1391(b)(2) must be met, as they are in this case.

their residences in Nevada, which affected them there; the documentation of the legitimacy of the money was sent from Nevada; and the funds eventually were returned to Fiore and Gipson in Nevada, verifying the lack of probable cause for forfeiture. The arrival of the funds in Nevada was the event that caused Fiore and Gipson's cause of action to mature, because their case was not ripe until the government abandoned the forfeiture case against them. *See Albright v. Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J., concurring). Taking all these events together, "a substantial part of the events or omissions giving rise to the claim occurred" in Nevada. 28 U.S.C. § 1391(b)(2). Venue is proper in the District of Nevada.

III. CONCLUSION

[21] Walden seized all of the large amount of money Fiore and Gipson were carrying with them as they travelled from San Juan to Las Vegas via Atlanta. Although Fiore and Gipson sent Walden, from Nevada, documentation establishing the legitimate sources of their funds, he persisted in seeking forfeiture of their money. Walden's intentional acts with regard to the false probable cause affidavit and the consequent delay in returning their money were expressly aimed at Nevada and so satisfy the requirements for personal jurisdiction. As to the search and seizure claim, we are remanding it to the district court for the exercise of discretion with regard to pendent personal jurisdiction. We also hold that venue is proper in the District of Nevada.

IV. POST-SCRIPT

A.

As the foregoing analysis makes clear, Judge O'Scannlain's dissent from the denial of rehearing en banc criticizes an opinion we did not write. Fiore and Gipson's complaint alleges not only that Walden seized their funds in violation of the Fourth Amendment—a claim we assume does *not* independently support personal jurisdiction in Nevada, *see supra* page 8957—but also that among other things, by filing a false affidavit, he effected a continued seizure of these funds, also in violation of the Fourth Amendment. Judge O'Scannlain ignores these latter allegations, but they are clearly—indeed, predominantly—pleaded in the complaint, which alleges:

> 102. It is clearly established law that any reasonable police officer would recognize the defendants undertook the following actions in violation of the Fourth Amendment of the United States Constitution:
>
> > i. In initially seizing the funds at issue despite a lack of probable cause that would have been recognized by a reasonable officer in the employ of the United States;
> >
> > ii. In retaining the funds despite an ability to return after actually reaching a conclusion that plaintiffs' funds were not the result of any drug related activity;

> iii. In drafting and forwarding for prosecution a probable cause affidavit for the continued seizure of plaintiffs' funds while knowing that the affidavit contained false statements of fact to support the continued retention, and without such false statements would have indicated a clear lack of probable cause; and
>
> iv. In willfully seeking to prosecute the funds while withholding exculpatory information known to them.
>
> v. In willfully and intentionally withholding the scope of the exculpatory information to the Assistant United States Attorney to whom the defendants forwarded the matter for prosecution.

After that, the summarizing paragraph states:

> 110. Defendants' actions constitute a violation of U.S. Const. Amd. IV in the unreasonable seizure *and unreasonable continued seizure* of the plaintiffs funds. (Emphasis added)

As we have explained, according to the complaint, Walden was well aware of Fiore, Gipson, and the seized funds' substantial connection to Nevada by the time he filed the false affidavit, sought forfeiture of the funds. and withheld exculpatory evidence. Under our caselaw and that of the Supreme

Court, these known connections are more than sufficient to support personal jurisdiction. Moreover, far from holding that the plaintiffs' residence is determinative, as Judge O'Scannlain suggests, we have expressly held that it is not. *See supra* page 8961-62. Although the opinion Judge O'Scannlain imagines we issued might well merit further review, the one we actually wrote does not.

B.

We agree with Judge McKeown's statement in her dissent from the denial of rehearing en banc that for Nevada constitutionally to exercise jurisdiction over Walden, he would need to be a "'primary participant[ ] in an alleged wrongdoing intentionally directed at'" Nevada. __ F.3d __, __ (9th Cir. 2012) (McKeown, J., dissenting from denial of rehearing en banc) (quoting *Calder*, 465 U.S. at 790). We disagree, however, for reasons we have explained, with her contention that this standard has not been met here.

In particular, contrary to Judge McKeown's assertion that "Nevada was neither a 'focal point' nor relevant to the affidavit," the complaint alleges that the "funds were readily identifiable [as] originating and returning to Las Vegas as the ordinary static place where they were situated as plaintiffs' bank for gambling" and that, when eventually returned, the funds were returned to Nevada. Fiore and Gipson allege that, by filing a false affidavit to support continued retention of these funds, Walden wrongfully perpetuated a seizure of funds he *knew* originated in and were returning to Nevada, belonging to people he *knew* had substantial connections to that state, all in an effort "to support

the continued retention" of the funds. That is, the complaint alleges that Walden was a primary participant in a wrongdoing intentionally and directly—not just foreseeably or derivatively—targeting Nevada funds and persons.

Under our case law, these allegations unquestionably support personal jurisdiction in Nevada. Our cases hold that where a defendant's actions have only an indirect or unintended impact on forum-resident plaintiffs, even where a defendant knows of a plaintiff's forum-residence and could foresee such an impact, the express-aiming requirement is not satisfied. *See, e.g.*, *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004). In contrast, where —as in this case —a defendant intentionally, individually, and directly targets a person—or, as here, funds—known to have strong connections with a forum, we have held the express-aiming requirement satisfied. *See Bancroft & Masters v. Augusta Nat'l*, 223 F.3d 1082, 1087 (9th Cir. 2000); *see also Dudnikov v. Chalk & Vermilion Fine Arts*, 514 F.3d 1063, 1076 (10th Cir. 2008) (citing approvingly *Bancroft & Masters* and holding that express aiming was satisfied where the purpose of defendant's actions was to cause harm to forum-resident plaintiffs).

The complaint alleges not that Walden inadvertently filed a false affidavit, but rather that he intentionally filed an affidavit he *knew* was false, —allegations analogous to fraud.[24] As this opinion

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[24] Judge McKeown is concerned that the affidavit is not in the "record." Of course, that is because this case comes to us on

discusses in detail, our caselaw firmly establishes that fraud directed at harming a *particular* person in a forum meets the express aiming standard.

A straightforward application of circuit precedent to the facts of this case leads easily to the conclusion that there is indeed personal jurisdiction over Walden in Nevada: Walden intentionally targeted persons and funds with substantial connections to Nevada. He thus expressly aimed his conduct at that state, providing a sufficient basis for personal jurisdiction. There is nothing at all novel about this conclusion.

REVERSED and REMANDED.

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a motion to dismiss. At this juncture, the record is essentially limited to the complaint.

IKUTA, Circuit Judge, dissenting:

Gambling, it is said, is a "sure way of getting nothing from something." Here, by contrast, two professional gamblers get something from nothing. Although their complaint contains nothing that would provide a basis for asserting personal jurisdiction over the federal agent who allegedly violated their Fourth Amendment rights, the majority finds "something" in the complaint: specifically, the "false affidavit/forfeiture proceeding *aspect*" of their case. Maj. op. at 8955 (emphasis added). This "aspect," the majority determines, provides a basis for personal jurisdiction over the federal agent, even though it is neither a constitutional tort nor a state law claim, and even though plaintiffs never argued that it was. And the gamblers' lucky streak does not end there: the majority then reverses the district court for failing to discern this elusive "aspect" and to apply the entirely discretionary (and rarely invoked) doctrine of "pendent personal jurisdiction." In fact, the district court correctly determined that the complaint did not make a prima facie showing that the federal agent purposefully directed his actions to the forum state. Because the district court did not err in dismissing the complaint for want of personal jurisdiction, I dissent.

I

The complaint in this case relates the following tale. Gina Fiore and Keith Gipson are professional gamblers. On their return from a gambling trip to

San Juan, Puerto Rico, their "traveling bank"[1] and winnings had grown to over $97,000, which they divided between their carry-on bags and their pockets. At the San Juan airport, TSA agents searched Gipson's bag and found about $50,000. The agents also discovered about $30,000 in Fiore's carry-on. Upon spotting such large sums of cash, the TSA agent called a supervisor, who contacted DEA agent Michael Cuento and two others.

Fiore told Cuento that she and Gipson had departed from the El San Juan Casino, where they had been gambling. Fiore and Gipson showed Cuento valid California driver's licenses, volunteered that they had Nevada and California residences, and indicated that they were returning to their residences in Las Vegas. Cuento escorted them onto the plane, but he told them they should not be surprised if they were asked further questions.

Fiore and Gipson landed in Atlanta and proceeded to their gate for their connecting flight to Las Vegas. There, they met agent Walden and another DEA agent who called for a drug-sniffing dog. Fiore and Gipson were (falsely, they say) informed that the dog had alerted. Agent Walden seized their cash, but assured them that if they produced receipts demonstrating that the funds were legitimate, their money would be returned. With that assurance, plaintiffs boarded their plane to Las

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[1] A "traveling bank" is a significant amount of currency (here, tens of thousands of dollars) carried by professional gamblers to cover traveling expenses and give them a cushion if they suffer losses.

Vegas. From the fact that their checked bags did not make it to Las Vegas with the plane, the disheveled state of the items inside, and the absence of a TSA sticker, plaintiffs surmised that the DEA, with the participation of agent Walden, conducted a search of their checked baggage.

Upon their return, Fiore and Gipson forwarded to Walden tax returns, receipts from their trip, their travel itinerary, and hotel records showing that they had gambled enough to have rooms "comped." They explained that Gipson had played under a legal alias he commonly used in gaming. They also sent a "win record" on El San Juan letterhead. Despite, as plaintiffs allege, "necessarily recogniz[ing] that the seized funds were not related to any illicit drug trade and were not contraband or the proceeds of contraband," Walden did not return their funds. Not only that, but they allege "on information and belief" that Walden, along with two unnamed defendants, worked "to provide a false probable cause affidavit, known by each to be false, for forwarding to the U.S. attorney in Georgia to prosecute a forfeiture action," an affidavit that Fiore and Gipson contend omitted exculpatory information.

Even though Walden necessarily recognized the funds' legitimacy, plaintiffs allege, he did not return the funds and referred the matter for prosecution because he "personally disapproved" of the strategies plaintiffs used in gambling.[2] The AUSA to whom the

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[2] Walden's uncontested declaration, by contrast, states that he lacked any authority over the seized cash once it had been transferred to a secure location for processing and storage.

matter was referred ultimately ordered the funds returned some six months later for lack of probable cause.

If plausible, this story might support Fiore and Gipson's claim that Walden seized their traveling bank in violation of their Fourth Amendment rights. But there is one problem: Fiore and Gipson filed the complaint against Walden in a district court in Nevada, but failed to allege that Walden had *any* contacts with that state for purposes of personal jurisdiction. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (personal jurisdiction cannot constitutionally be asserted unless defendant has "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))). Notably absent from plaintiffs' complaint is any allegation:

- that plaintiffs told Walden of their Las Vegas residences;
- that Cuento ever spoke with Walden;
- that Cuento told Walden of plaintiffs' connection to Las Vegas;
- that plaintiffs showed Walden any Nevada-issued identification (in fact, Agent Walden's uncontested declaration confirms that Fiore and Gipson showed him California, not Nevada, licenses);

Indeed, the complaint does not expressly allege that even *after* the seizure, Walden became aware

that plaintiffs' residence was in Nevada; it alleges only that plaintiffs forwarded their tax returns, trip receipts, and the like to Walden "from Las Vegas." And Walden's uncontested declaration makes clear that he never contacted plaintiffs' attorney "or anyone else in Nevada," and has never lived in, been to, owned property or conducted any business in Nevada.

Given these facts, and applying the applicable precedent, *see Calder v. Jones*, 465 U.S. 783 (1984); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004), the district court concluded that Walden's search of plaintiffs' luggage and seizure of the money "was expressly aimed at Georgia, not Nevada": the search occurred in Georgia, as did the questioning and the seizure. It therefore dismissed plaintiffs' action for want of personal jurisdiction. As explained below, the district court's thorough and well-reasoned decision was clearly correct.

II

For a court to have specific personal jurisdiction over a defendant in a tort suit, (1) the defendant must have purposefully directed specific activities toward the state forum, (2) the plaintiff's claim must arise out of or relate to those specific forum-related activities, and (3) the exercise of jurisdiction must comport with "fair play and substantial justice." *Schwarzenegger*, 374 F.3d at 802; Fed R. Civ. P. 4(k)(1)(A). In other words, in order for the district court to have asserted personal jurisdiction over Walden, it would have had to conclude that Walden

purposefully directed the actions that form the basis of plaintiffs' claim to Nevada.

In determining whether the defendant "purposefully directed" the activities which are the subject of plaintiff's claim to the forum state, we consider whether the defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (citing *Calder v. Jones*, 465 U.S. at 788-89). As a matter of simple logic, a defendant cannot "expressly aim" an intentional act at a victim's home state if the defendant committing the action does not even know that the victim has any connection with that state. *See Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) ("From the available cases, we deduce that the ['express aiming'] requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."); *cf. Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1258 (9th Cir. 2008) (approving the exercise of personal jurisdiction in California where defendant, a Virginia resident with no other ties to California, ordered local police to prevent plaintiff from flying out of the San Francisco airport and to detain her for further questioning).

This framework creates a problem for Fiore and Gipson: when Walden seized the cash, he knew only that the plaintiffs had California driver's licenses and were headed to Las Vegas. The complaint does not even hint that Walden learned of plaintiffs' ties to

Las Vegas until *after* the seizure was complete. Because there is no allegation that Walden purposefully directed the actions that form the basis of plaintiffs' claim to Nevada, a Nevada district court necessarily lacks personal jurisdiction over Walden. That should be the end of the matter.[3]

III

But it is not, because the majority shows more creativity construing the complaint than Fiore and Gipson did drafting it. That is, the plaintiffs allege one simple claim: a violation of their Fourth Amendment rights to be free of unreasonable searches and seizures. The gravamen of Fiore and Gipson's complaint is that "[t]he search and withholding of [their] checked baggage . . . was without probable cause, unreasonable, and also constituted an illegal search and seizure by the defendants." Or, as they later put it, "Defendants' actions constitute a violation of U.S. Const. Amd. IV in the unreasonable seizure and unreasonable continued seizure of the plaintiff's funds."

The majority, however, purports to flush out a second claim roosting amidst the lines of the complaint. According to the majority, there is a "false affidavit/forfeiture proceeding aspect of [the] case," maj. op. at 8955, which gives rise to "an allegation that Walden attempted to *defraud* Fiore and Gipson of the seized funds," maj. op. at 8964 (emphasis added). Because, the majority explains, at the time

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[3] Indeed, the majority concedes that the complaint does not allege that Walden knew of plaintiffs' Nevada residency when he seized the $97,000. *See* maj. op. at 8961.

Walden prepared the false probable cause affidavit, he knew plaintiffs had significant connections with Nevada, the district court erred in not asserting personal jurisdiction over Walden based on this false affidavit "aspect" of the case. Maj. op. at 8964-65.

The majority's analysis completely misses the mark for a crucial reason: the complaint did not include a fraud claim. We analyze personal jurisdiction on a claim-by-claim basis. *See, e.g.*, *CollegeSource, Inc. v. AcademyOne, Inc.*, No. 09-56528, ___ F.3d ___, 2011 WL 3437040, at *7 (9th Cir. Aug. 8, 2011) (focusing the jurisdictional inquiry on plaintiff's state law misappropriation claim); *see also Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001) (stating that a district court's specific personal jurisdiction "is claim specific," meaning that personal jurisdiction over one defendant as to a particular claim does not necessarily give the court personal jurisdiction over that same defendant as to the plaintiff's other claims). The only claim in this complaint is a Fourth Amendment claim for seizure of property. There is no claim that Walden's preparation of the allegedly fraudulent affidavit violated plaintiffs' Fourth Amendment rights,[4] and it is doubtful that such a constitutional tort even exists.

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[4] One combs through the complaint in vain to find any argument that the creation of a false probable cause affidavit is a separate constitutional tort. Rather, the plaintiffs point to the false affidavit to support their Fourth Amendment claim, stating that "[t]he law is clearly established that falsifying evidence on an affidavit in support of a seizure or a search renders the seizure or search unconstitutional."

Nor did the plaintiffs bring a state fraud claim. In fact, the plaintiffs do not appear to bring any state claim at all: they claimed federal jurisdiction based on the general federal question statute (28 U.S.C. § 1331) and 28 U.S.C. § 1356,[5] and do not invoke diversity jurisdiction. For that matter, the complaint does not allege over $75,000 in controversy as required for diversity jurisdiction, *see* 28 U.S.C. § 1332(a), or facts from which it is "facially apparent" that the "jurisdictional amount is in controversy," *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (internal quotation omitted). Nor does the complaint invoke supplemental jurisdiction.

Indeed, it is doubtful that the elements of a state law fraud cause of action are even lurking in the complaint. Under Nevada law, the elements of a fraud cause of action are (1) a false representation by defendant; (2) defendant's knowledge or belief that the representation was false; (3) defendant's intent that plaintiff act or refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance upon it; and (5) damage to plaintiff as a result. *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1155 (9th Cir. 2005). The complaint does not, however, allege that Walden intended plaintiffs to act or refrain from acting in reliance on the false affidavit, or that plaintiffs justifiably relied on the affidavit.

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[5] 28 U.S.C. § 1356 provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction . . . ."

In any event, an unarticulated state law claim could not give the majority a basis for reversing the district court. When the district court, which had original jurisdiction only over the Fourth Amendment claim, dismissed that claim for lack of personal jurisdiction, it was well within its discretion to decline to exercise supplemental jurisdiction over any implicitly lurking state law claim. *See* 28 U.S.C. § 1367(c)(3); *Bryant v. Adventist Health Sys./W.*, 289 F.3d 1162, 1165 (9th Cir. 2002) (district court's decision to decline supplemental jurisdiction reviewed for abuse of discretion).

Because plaintiffs based their claim on Walden's seizure of the cash (which not even the majority contends was purposefully directed toward Nevada) and did not, as the majority suggests, allege a fraud claim, it is impossible to say that plaintiffs' *claim* arose out of or related to Walden's conduct in preparing the allegedly false probable cause affidavit. *See Schwarzenegger*, 374 F.3d at 802.

IV

The majority's reasoning threatens a substantial expansion of the scope of personal jurisdiction. If a district court commits reversible error by failing to give due weight to the "false affidavit/forfeiture proceeding *aspect*" of a complaint, maj. op. at 8955 (emphasis added), even where the parties never asked the court to do so, district courts must scour complaints to find some allegation of wrongful action that might have occurred after the defendant became aware of the plaintiff's residence. Such a ruling essentially requires courts to assert personal jurisdiction over any defendant who learns about the

home state of the plaintiff at any time *after* the defendant engaged in the conduct that formed the basis of plaintiff's claim. To ensure this result, plaintiffs need only assert that the defendant knew their home state and subsequently engaged in some wrongful act.

Obviously, this loosens the due process protection afforded defendants beyond anything allowed by the Supreme Court, which recently reemphasized that personal jurisdiction is not an outmoded legal fiction, but remains a vital part of due process and fair play. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (striking down the New Jersey Supreme Court's broad ruling that a state court had personal jurisdiction over a company despite the defendant's lack of minimum contacts with the state.) As the plurality noted, "[f]reeform notions of fundamental fairness divorced from traditional practice" do not give a state lawful judicial authority over a defendant, *id.* at 2787; *see also id.* at 2791 (Breyer, J., concurring in the judgment) (rejecting the state court's adoption of "a broad understanding of the scope of personal jurisdiction based on its view that '[t]he increasingly fast paced globalization of the world economy has removed national borders as barriers to trade'" (alteration in original) (quoting 987 A.2d 575, 577 (N.J. 2010)).

The majority's decision today unwisely broadens the scope of personal jurisdiction, erroneously rejects the district court's adherence to "traditional practice" in favor of its own "[f]reeform notions" of fairness, *id.* at 2787 (plurality opinion), and holds that Walden is

subject to the jurisdiction of a Nevada court despite his having no contacts whatsoever to that state in connection with plaintiffs' Fourth Amendment claim. Because "those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter," *id.*, I dissent.

Postscript

The majority's postscript to the opinion amplifies the error of the opinion in two ways. First, it expands the meaning of a "claim" for purposes of personal jurisdiction. Second, it completes the opinion's evisceration of the test for purposeful direction. Together, these changes signal that the traditional due process limitations on a court's authority to assert personal jurisdiction over an out-of-state defendant no longer pose any meaningful constraint on courts in the Ninth Circuit.

A

In its most recent changes, the majority continues its search for a theory to save the plaintiffs' complaint. The original opinion's personal jurisdiction analysis relied entirely on the false affidavit "aspect" of plaintiffs' complaint. Maj. op. at 8955, 8957, 8965. According to the majority, this aspect "amounted to an attempt to defraud" Fiore and Gipson. Maj. op. at 8973. Under the pressure of an en banc call, the majority has promoted this false affidavit and fraud "aspect" of the complaint to a full-blown cause of action for the "continued seizure" of plaintiffs' funds "in violation of the Fourth Amendment." Maj. op. at 8978. Because this is

"arguabl[y]" a cause of action, the majority's amended opinion now asserts that personal jurisdiction may be derived from this newly identified claim. Maj. op. at 8956 n. 17.

This is a dramatic and unjustified shift. Until the majority's postscript, no one involved in the litigation—not the plaintiffs, the defendant, or any court—had read the complaint as containing two separate Fourth Amendment claims. Neither plaintiffs' briefs nor their arguments before this court or the district court raised any such theory. Rather, plaintiffs argued that the court had personal jurisdiction over Walden based on the single claim they actually pled: Walden's initial seizure of funds at the airport. Nothing was mentioned about a "continued seizure." And with good reason: no court has ever given an indication that a *Bivens* claim for a "continued seizure" even exists.[6] Naturally, Walden never challenged an argument not made.

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[6] Three circuits have squarely considered and rejected the theory that "continued seizures" violate the Fourth Amendment. *See Gonzalez v. Vill. of W. Milwaukee*, 671 F.3d 649, 660 (7th Cir. 2012) ("[C]ontinued retention of unlawfully seized property is not a separate Fourth Amendment wrong."); *Lee v. City of Chicago*, 330 F.3d 456, 461-66 (7th Cir. 2003); *Fox v. Van Oosterum*, 176 F.3d 342, 351-52 (6th Cir. 1999); *United States v. Jakobetz*, 955 F.2d 786, 802 (2d Cir. 1992). Moreover, as the Supreme Court has recently reiterated, courts should be extremely cautious about extending Bivens to new constitutional claims. *See Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012) (refusing to imply a *Bivens* action for Eight Amendment violations by employees of a privately operated federal prison); *id.* at 622 (noting that the Court has not implied a new *Bivens* action since 1980).

But now, after the appeal, its published opinion, and the en banc proceedings, the majority has changed the rules of the game. Under the majority's new theory, a court can rest its personal jurisdiction holding on any factual allegation in a complaint that a court deems to "arguably" create a cause of action—whether actually argued by the plaintiff or not. A "claim" can be "arguable" even though no court has ever recognized it, and it can be discovered by the court sua sponte at any stage in the litigation, including during en banc proceedings. This unbounded approach will impose enormous costs on litigants and state courts, both of whom must now bear the burden of scouring complaints in order to divine the personal jurisdiction implications of each and every factual allegation.

B

In addition to expanding what it means to be a "claim" for purposes of personal jurisdiction, the majority's postscript comes close to erasing whatever is left of the Ninth Circuit's test for determining whether that "claim" supports specific personal jurisdiction. *See* J. McKeown dissent from denial at 8943-45; J. O'Scannlain dissent from denial at 8934-35.

The Supreme Court has "consistently held" that a state court cannot assert personal jurisdiction over a defendant merely because it is foreseeable that the defendant's actions could cause an injury in that state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Rather, "it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *J. McIntyre Machinery*,

131 S. Ct. at 2789. In order to give rise to personal jurisdiction, these actions must be "expressly aimed" at the forum state. *Calder*, 465 U.S. at 789.

Our cases have eroded this requirement. For example, in *CE Distribution, LLC v. New Sensor Corp.*, we held that a defendant's actions in New Jersey were expressly aimed at Arizona because "it is reasonable to infer that [defendant] had every reason to know that the effect of the [New Jersey transactions] would resonate in Arizona." 380 F.3d 1107, 1111 (9th Cir. 2004). We went even further in *Brayton Purcell LLP v. Recordon & Recordon*, where we held that the defendant law firm "individually targeted" plaintiff's law firm in one forum by publishing plaintiff's copyrighted online marketing material in a different forum. 606 F.3d 1124, 1129-30 (9th Cir. 2010). But, as Judge Reinhardt pointed out in dissent, the allegedly infringing material was aimed solely at prospective clients in the defendant's own district, where its lawyers "practiced exclusively." *Id.* at 1132 (Reinhardt, J., dissenting). Despite the fact that such behavior "is quite the opposite of 'directly targeting the forum,'" *id.*, we held that it was sufficient "express aiming" to support personal jurisdiction.

This case deals the coup de grace to any semblance of compliance with Supreme Court precedent. *See* J. O'Scannlain dissent from denial at 8934-35. Under the majority's logic, a court can rely on any allegation that the defendant committed a wrongful act at a time when the defendant should have known that plaintiffs had "strong connections" with a state. Maj. op. at 8980. The complaint need

not allege a wrongful act that is legally cognizable, maj. op. at 8956 n. 17, or even that defendant actually knew of plaintiffs' connections to the forum state at the time the defendant committed the allegedly wrongful act, maj. op. at 8959. Rather, all that is needed is the allegation that some intentional act by the defendant has a foreseeable effect on a plaintiff in another state. In other words, as Judge McKeown correctly observes in her dissent from the denial of rehearing en banc, we have adopted the exact foreseeability framework that the Supreme Court has consistently rejected. *See* J. McKeown dissent from denial at 8943-45.

This impermissible expansion of personal jurisdiction has substantial consequences. For one thing, federal officials working in a transportation hub who are sued by disgruntled travelers can now be forced to litigate in any traveler's home state. A court has personal jurisdiction over such an official so long as (1) it can infer that the official had reason to know the traveler's residence at some point during the litigation, and (2) it can discern some "arguable" cause of action in the traveler's complaint. Under such a "test," a TSA official in Minneapolis who stopped a traveler on a no-fly list can be forced to litigate a claimed equal protection violation in the traveler's home town, whether in Pocatello or Anchorage.

In short, there are no effective limits to the majority's reasoning: all the airport officials who interacted with Fiore and Gipson in Atlanta have potentially subjected themselves to the judicial power of Nevada. This essentially reduces the showing of

personal jurisdiction to a pleading exercise and, by doing so, grants state courts in the Ninth Circuit an unconstrained power to "bind strangers to the State." *J. McIntyre Machinery*, 131 S. Ct. at 2787. This not only flouts common sense, but also ignores the Supreme Court's recent recognition that personal jurisdiction continues to play a vital role in defending basic fairness and due process. *See id.* at 2786-87.

Judges O'Scannlain, McKeown, and I are not the first to decry this lamentable development in our case law. *See, e.g.*, *Brayton Purcell*, 606 F.3d at 1131-32 (Reinhardt, J., dissenting from the majority's application of the express aiming requirement); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1224-25 (9th Cir. 2006) (en banc) (Ferguson, J., dissenting from the same, joined by O'Scannlain, J., Tashima, J.). But there is even more to lament today, as the majority has done significant further damage to the "traditional notions of fair play and substantial justice" guarded by the long-established rules of personal jurisdiction. *Int'l Shoe*, 326 U.S. at 316.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 2:07-cv-01674-ECR-LRL

GINA FIORE and KEITH GIPSON,

Plaintiffs,

vs.

ANTHONY WALDEN and three unknown agents/attorneys with the United States Drug Enforcement Administration,

Defendants.

ORDER

Edward C. Reed,
United States District Judge

Filed: October 17, 2008

This case arises out of the temporary seizure of money belonging to Plaintiffs Gina Fiore ("Fiore") and Keith Gipson ("Gipson") by certain agents of the United States Drug Enforcement Administration ("DEA"), including Defendant Anthony Walden ("Walden"). The case is brought against Defendants in their respective individual capacities.

Plaintiffs' original Complaint (#1) was filed December 14, 2007. On June 30, 2008, Walden filed a Motion (#9) to dismiss Plaintiffs' Complaint (#1). On July 18, 2008, Plaintiffs opposed (#12) Walden's motion, but on the same day Plaintiffs also filed a First Amended Complaint (#11), rendering the complaint Walden sought to dismiss inoperative and mooting both Walden's motion and Plaintiffs' opposition. On August 1, 2008, Walden filed a new Motion (#13) to dismiss Plaintiffs' First Amended Complaint (#11) pursuant to Fed. R. Civ. P. 12(b)(2), for lack of personal jurisdiction, and Fed. R. Civ. P. 12(b)(3), for improper venue. Plaintiffs opposed (#15) Walden's motion on August 19, 2008, and on August 28, 2008, Walden replied (#18). On September 11, 2008, we ordered (#19) the parties to file contemporaneous briefs limited to the question of whether, in the event that this Court finds personal jurisdiction has not been established, the case should be transferred pursuant to 28 U.S.C. § 1631. Both parties filed such briefs (##20, 21), and Defendant also submitted a reply brief (#22).

The motion (#13) is ripe, and we now rule on it. We need not consider the issue of venue, because our ruling regarding personal jurisdiction is dispositive.

I. Background

Plaintiffs are professional gamblers who travel as part of their work. (Amended Compl. ¶¶ 8-9 (#11).) Although their place of residence is a matter of some dispute, they allege that they are both residents of Nevada. (*Id.* at ¶ 2.) The events at issue in this case took place during a business trip that began in Las Vegas, went to Atlantic City, New Jersey, and continued to San Juan, Puerto Rico, before returning to Las Vegas. (*Id.* at ¶ 11). On the return leg, Plaintiffs stopped in Atlanta to change airplanes. (*Id.* at ¶43.) Plaintiffs had in their possession at that time approximately $97,000 in U.S. currency. (*Id.* at ¶ 13.)

In Atlanta, Plaintiffs were approached and questioned by DEA agents, including Walden. (*Id.* at ¶¶ 46-53.) In addition to questioning Plaintiffs, the DEA agents used a narcotics dog to perform a sniff test of Plaintiffs' belongings. (*Id.* at ¶ 55.) After the DEA agents' initial investigation was completed, Walden and the other DEA agents seized the currency in Plaintiffs' possession on suspicion that the currency was involved in drug transactions. (*Id.* at ¶¶ 59-60.) These funds were eventually — approximately six months later — returned to Plaintiffs. (*Id.* at ¶ 95.) Plaintiffs contend that the actions of Walden and the other defendants relating to the search and seizure amount to a violation of Plaintiffs' Fourth Amendment rights. (*Id.* at ¶ 110.)

II. Standard for Dismissal for Lack of Personal Jurisdiction

The plaintiff bears the burden of establishing that this Court has personal and subject matter

jurisdiction over the defendant. *See Mattel, Inc. v. Greiner & Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. 2003). A motion to dismiss for lack of jurisdiction may attack the sufficiency of the complaint, or it may be made as a "speaking motion" attacking the existence of jurisdiction as a matter of fact. *Thornhill Pub. Co., Inc. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). "Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary." *Id.* However, absent an evidentiary hearing, the plaintiff "need only make a prima facie showing of jurisdiction to survive the motion to dismiss." *Mattel*, 354 F.3d at 862. Further, absent an evidentiary hearing, the non-movant's version of any contested facts must be taken as true. *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1160 (9th Cir. 2007).

III. Personal Jurisdiction Analysis

An analysis of personal jurisdiction has two components. First, there must be a statute that gives the court authority to exercise jurisdiction. *Data Disc Inc. v. Sys. Tech. Assoc. Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977). Second, the exercise of jurisdiction must meet Constitutional due process standards. *Id.* Because there is no applicable federal statute governing personal jurisdiction, our starting point is Nevada's long-arm statute. *See* Fed. R. Civ. P. 4(k)(1)(A); *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001) (per curiam). Nevada's long-arm statute permits the exercise of jurisdiction to the limits of due process. N.R.S. § 14.065; *See Abraham*

v. Agusta, S.P.A., 968 F. Supp. 1403, 1407 (D. Nev. 1997). Thus, our analysis of personal jurisdiction under Nevada's long-arm statute and the Constitution collapse into one, and we consider only whether the exercise of jurisdiction comports with the Fourteenth Amendment's due process requirements.

A court may have personal jurisdiction over a defendant in one of two ways: general or specific. *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995). Here, Plaintiffs do not argue that general jurisdiction exists, so we proceed to the parties' arguments concerning specific jurisdiction.

The Ninth Circuit has established a three-prong test for analyzing a claim of specific personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either

> of these prongs, personal jurisdiction is not established. If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (internal citations and quotation marks omitted). For the reasons that follow, we conclude that Plaintiffs have failed to satisfy the first prong of this test.

1. Purposeful Direction and Purposeful Availment

Although courts often refer to the first part of the three-part test described in *Schwarzenegger* in shorthand as "purposeful availment," this portion of the test breaks down into two alternative sub-parts, purposeful availment and purposeful direction. *Schwarzenegger*, 374 F.3d at 803. Plaintiffs concede that only purposeful direction analysis is relevant here. (P.s' Opp. 13 (#15).)

Purposeful direction is evaluated under a three part "effects test" derived from the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984). *See, e.g., Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006). The effects test "requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).

In the context of the effects test, an "intentional act" means only "an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of the act." *Schwarzenegger*, 374 F.3d at 803. Here, this first part of the effects test is satisfied by Walden's intentional act of searching Plaintiffs' luggage and seizing money from them.[1]

Plaintiffs must next establish that Walden's intentional act was expressly aimed at Nevada. Plaintiffs argue that Walden's alleged knowledge that Plaintiffs were residents of Nevada and that Plaintiffs were on their way to Nevada at the time of the seizure suffices to establish that Walden's intentional act was expressly aimed at Nevada in the meaning of *Calder*. We disagree.

Here, Walden's intentional act — the search of Plaintiffs' luggage and seizure of their currency — was expressly aimed at Georgia, not Nevada. Walden's search of Plaintiffs' luggage took place in Georgia. Walden's questioning of Plaintiffs took place in Georgia. Walden's seizure of Plaintiffs' currency took place in Georgia. It may be true, as Plaintiffs

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[1] We note that Plaintiffs also allege that Walden is personally responsible for "continuing to hold" the seized currency, rather than returning it to Plaintiffs. Plaintiffs characterize this as an affirmative, intentional act expressly aimed at Nevada. We find no basis for so concluding. Walden was not in possession of the currency for more than a short period of time after the seizure, and had no legal authority to return it. Thus, the failure to return the currency could not constitute an intentional act by Walden within the meaning of *Calder* and *Schwarzenegger*.

allege, that Walden's intentional acts committed in Georgia eventually caused harm to Plaintiffs in Nevada, and Walden may have known that Plaintiffs lived in Nevada. But this alone does not confer jurisdiction. *See Schwarzenegger*, 374 F.3d at 807.

The authority Plaintiffs cite in support of their position is distinguishable. *See Schwarzenegger*, 374 F.3d at 806 ("The 'express aiming' analysis depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue."). Walden took no actions associated with placing goods (legal or illegal) into the stream of commerce destined for the forum state, as did the defendants in *Fortis Corporate Ins. v. Viken Ship Management*, 450 F.3d 214 (6th Cir. 2006), *J. Henrijean & Sons v. M.V. Bulk Enterprise*, 311 F. Supp. 417 (W.D. Mich. 1970), and *Philip Morris USA, Inc. v. Lee*, 494 F. Supp. 2d 544 (W.D. Tex. 2007). Walden did not make use of the internet to interfere with the trademark of a corporation registered and doing business in the forum state, as did the defendants in *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082 (9th Cir. 2000) and *Panavision Int'l, Ltd. P'shp v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998). The defendant in *Ibrahim v. Dep't. of Homeland Sec.*, — F.3d — , 2008 WL 38223029 (9th Cir. Aug. 18, 2008), spoke on the telephone with law enforcement officials within the forum state, directing them to take actions against the defendant, who was also within the forum state at the time. Walden neither placed nor received any telephone calls to or from Nevada. In short, Plaintiffs do not cite, and we have not discovered, any case in which a law enforcement official has been haled into

court in a distant forum under circumstances analogous to the present case.

Plaintiffs have failed to demonstrate that Walden expressly aimed his intentional acts at Nevada. Plaintiffs therefore have not established that this Court has personal jurisdiction over Walden.[2]

IV Transfer to Cure Want of Jurisdiction

Jurisdictional defects that arise when a suit is filed in the wrong federal court may be cured by transfer under the federal transfer statute, 28 U.S.C. § 1631. Such transfer is appropriate only when the court finds that "it is in the interest of justice" to do so. *Id.* However, the parties here agree that such a transfer would not be in the interests of justice. Therefore, we conclude that transfer to cure want of jurisdiction would not be appropriate in the circumstances of this case.

V. Conclusion

Plaintiffs have not met their burden of establishing that this Court has personal jurisdiction over Walden. While Plaintiffs have made out a prima facie case that Walden committed intentional acts that may have caused harm to Plaintiffs in Nevada, they have not made out a prima facie case that

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[2] Because Plaintiffs have failed to sustain their burden with respect to the second part of the *Calder* effects test, we need not, and do not, reach the third part of the test. Further, because Plaintiffs have thus failed to establish the first part of the *Schwarzenegger* test, we need not, and do not, reach the second and third parts of that test.

Walden expressly aimed his acts at Nevada. Because Plaintiffs have not satisfied all three parts of the Calder effects test, they have not shown that Walden purposefully directed his conduct at Nevada. Further, we find that transfer to cure want of jurisdiction, pursuant to 28 U.S.C. § 1631, would not be in the interest of justice in the circumstances of this case.

IT IS, THEREFORE, HEREBY ORDERED THAT Defendant Anthony Walden's Motion (#9) to Dismiss Plaintiffs' Complaint (#1) is **DENIED** as moot, and Defendant's Motion (#13) to Dismiss Plaintiffs' First Amended Complaint (#11) is **GRANTED**.

The Clerk shall enter judgment accordingly.

Dated: October 17, 2008

/s/
Edward C. Reed
United States District Judge

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-17558

GINA FIORE; KEITH GIPSON,

Plaintiffs-Appellants,

v.

ANTHONY WALDEN; UNKNOWN AGENTS OF THE FEDERAL GOVERMENT,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada,
D.C. No. 2:07-cv-01674-ECR-LRL
Edward C. Reed, Senior District Judge

ORDER

Before: Alfred T. Goodwin, Marsha S. Berzon and Sandra S. Ikuta, Circuit Judges.

Filed: Aug. 8, 2012

ORDER

The opinion, filed on September 12, 2011, is withdrawn and replaced by the amended opinion attached to this order.

With this amendment, the majority of the panel has voted to deny appellee's petition for rehearing. Judge Berzon has voted to deny the petition for rehearing en banc and Judge Goodwin so recommends. Judge Ikuta has voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The majority of the active judges have voted to deny rehearing the matter en banc. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are DENIED. Judge O'Scannlain's and Judge McKeown's dissents from denial of en banc rehearing are filed concurrently herewith.

O'SCANNLAIN, Circuit Judge, joined by TALLMAN, CALLAHAN, BEA, and IKUTA, Circuit Judges, dissenting from the order denying rehearing en banc:

Due process allows a court to exercise personal jurisdiction over a defendant only if "the defendant's conduct and connection *with the forum State* are such that he should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (emphasis added; internal quotation marks omitted). To meet this requirement in a tort case, a plaintiff generally must show that the defendant "expressly aimed" his tortious conduct at the forum state. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

In this case, the panel majority disregarded that fundamental requirement of due process. It held that a Nevada court could exercise personal jurisdiction over a defendant for his allegedly tortious conduct in Georgia even though: (1) *all* of the actions forming the basis of the plaintiffs' sole legal claim were taken in and directed at Georgia, and (2) when the defendant took those actions he did not know that the plaintiffs had *any* relevant connection to Nevada.

This ruling clashes with Supreme Court case law, exacerbates a conflict in our circuit law, begets a second intra-circuit conflict, and creates or deepens two lopsided conflicts with other circuits. The panel majority embraced the wrong side of each conflict. As Judge Ikuta recognized in dissent, the panel's holding "threatens a substantial expansion of the scope of personal jurisdiction." 657 F.3d 838, 864. We should have reheard this matter en banc to restore our circuit law and to harmonize it with that of the

Supreme Court. I respectfully dissent from the regrettable failure to rehear this case en banc.

I

A gambling trip in San Juan, Puerto Rico, left Gina Fiore and Keith Gipson with some $97,000 in cash. In August 2006 they took their cash to the San Juan airport to fly to Atlanta and then to Las Vegas. 657 F.3d at 842-43.

At the San Juan airport, TSA agents searched Fiore, Gipson, and their carry-on bags. After discovering their $97,000, the TSA agents summoned three DEA agents. Fiore told DEA agent Michael Cuento that she and Gipson had been gambling in San Juan. Fiore and Gipson showed Cuento their California driver's licenses, told Cuento that they had California and Nevada residences, and said that they were returning to the Nevada residences. Cuento let them board the plane but told them they might be questioned later in their trip. 657 F.3d at 843.

When Fiore and Gipson arrived in Atlanta and headed to their connecting gate to Las Vegas, DEA agent Anthony Walden approached them. Fiore and Gipson said they were going to Las Vegas and showed him California driver's licenses. After a drug-detection dog alerted at Gipson's bag, Walden seized all of Fiore and Gipson's cash because he suspected that it was connected to illicit drug activity. Walden told them that their money would be returned if they could show that they had obtained it legitimately. 657 F.3d at 843, 850.

Fiore and Gipson then flew to Las Vegas. They forwarded to Walden documents substantiating that

their money was legitimately obtained. They allege that, despite this documentation, Walden helped prepare a false probable cause affidavit to facilitate an action to forfeit their cash to the government. Walden allegedly submitted the affidavit to the U.S. Attorney for the Northern District of Georgia. 657 F.3d at 843-44.

The Assistant U.S. Attorney in charge of the case ultimately concluded that the government lacked probable cause to forfeit Fiore and Gipson's cash. The cash was returned about seven months after Walden seized it. 657 F.3d at 844.

II

A

Fiore and Gipson sued Walden in Nevada under *Bivens*, alleging that Walden violated their Fourth Amendment rights when he seized their cash in Georgia. Fiore and Gipson did not allege that Walden knew that they had relevant Nevada connections or that Walden directed his conduct at Nevada when he seized the money. They did not allege, for example, that they told Walden that they had Las Vegas residences, that Cuento spoke with Walden, that Cuento told Walden of Fiore and Gipson's connection to Las Vegas, that Fiore and Gipson showed Walden any Nevada-issued identification, or even that Walden later learned of their Nevada residences. *See* 657 F.3d at 861 (Ikuta, J., dissenting). Because Walden's search-and-seizure conduct was "expressly aimed" at Georgia—and Walden thus had no contacts with Nevada that are relevant to Fiore and Gipson's

one claim—the district court dismissed the complaint for lack of personal jurisdiction.

B

A divided panel of our court reversed. The panel majority accepted that Walden's seizure of the cash was "expressly aimed" at Georgia and thus could not independently support personal jurisdiction over him in Nevada. 657 F.3d at 849. But the majority believed that "the false probable cause affidavit *aspect* of the case" supported jurisdiction in Nevada. *Id.* (emphasis added). When Walden prepared the allegedly false affidavit, the majority contended, he knew that Fiore and Gipson had "significant connections" to Nevada. *Id.* at 851. The majority hypothesized that Walden by then knew of these "significant connections" because the plaintiffs told him that they were going to Las Vegas, the plaintiffs' funds were allegedly identifiable as originating from and returning to Las Vegas, Walden or someone else ran background checks on the plaintiffs after they returned to Nevada, and Fiore and Gipson sent Walden documents from Nevada. *Id.* at 850-51.

Based on these connections, the majority concluded that Walden "expressly aimed" his conduct at Nevada when he prepared the affidavit. 657 F.3d at 854; *see id.* at 850-51. Although this affidavit-related conduct did not form the basis of Fiore and Gipson's one and only claim—a Fourth Amendment claim based on the seizure at the Atlanta airport—the majority held that such conduct could support the exercise of pendent personal jurisdiction in Nevada over that claim. *Id.* at 858. The panel remanded to

the district court to decide whether to exercise pendent jurisdiction over the seizure claim. *Id.*

Judge Ikuta dissented. "As a matter of simple logic," she explained, "a defendant cannot 'expressly aim' an intentional act at a victim's home state if the defendant committing the action does not even know that the victim has any connection with that state." 657 F.3d at 862. Because Walden did not know of the plaintiffs' ties to Nevada when he seized their cash—and because the seizure forms the basis for the plaintiffs' *only* claim—he could not have expressly aimed his relevant conduct at Nevada. *Id.* at 862-63.

Noting that this should have been "the end of the matter," Judge Ikuta faulted the majority for allowing jurisdiction based on the false affidavit "aspect" of the case. 657 F.3d at 862, 863. The false affidavit was not used to seize the plaintiffs' cash; it was prepared after the seizure, to facilitate a forfeiture action. *See id.* at 861, 863. Thus, Judge Ikuta explained, any affidavit conduct could not support the exercise of personal jurisdiction over the seizure claim because the court could not say, as required by due process, that the seizure claim arose out of or related to Walden's later conduct in preparing the affidavit. *Id.* at 864.

III

The panel decision conflicts with Supreme Court case law, with decisions of other circuits, and with decisions of our court. We should have taken this case en banc to eliminate those conflicts.

A

The panel decision conflicts with *Calder v. Jones*, which holds that a court may exercise personal jurisdiction over a tort defendant only if the defendant "expressly aimed" his tortious conduct *at the forum state*. 465 U.S. at 789.

For a court to have specific personal jurisdiction over a non-resident tort defendant, (1) the defendant must have purposefully directed specific activities toward the state forum, (2) the plaintiff 's claim must arise out of or relate to those specific forum-related activities, and (3) the exercise of jurisdiction must be reasonable. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). In this case, for example, Fiore and Gipson would have needed to establish "that Walden purposefully directed the actions that form the basis of [their] claim to Nevada." 657 F.3d at 862 (Ikuta, J., dissenting). To establish such "purposeful direction," a plaintiff must show that the defendant committed an intentional act, expressly aimed that act at the forum state, and thereby caused harm that the defendant knew would likely be suffered in the forum state. *See Calder*, 465 U.S. at 788-90.

The panel decision stumbles in addressing *Calder*'s express-aiming requirement. In *Calder* the defendants wrote and edited an article that allegedly libeled actress Shirley Jones, who lived and worked in California. Though the article was largely prepared in Florida (where the defendants resided), it was circulated broadly in California. In holding that a California court had personal jurisdiction over the defendants, the Supreme Court emphasized that

the defendants had "expressly aimed" their allegedly tortious conduct "at California." 465 U.S. at 789. The defendants had done so by making California "the focal point both of the story and of the harm suffered": the defendants' article "was drawn from California sources" and "impugned the professionalism of an entertainer whose television career was centered in California." *Id.* at 788-89. The defendants' conduct was, in short, "calculated to cause injury to [Jones] in California." *Id.* at 791.

Fiore disregards *Calder*'s express-aiming requirement, holding that a Nevada court could exercise personal jurisdiction over Walden even though Nevada is not "the focal point" of the plaintiffs' only tort claim. Indeed, the majority took matters a step further, allowing personal jurisdiction even though Walden did not know of Fiore and Gipson's connections to Nevada when he seized their cash. "[W]hen Walden seized the cash, he knew only that the plaintiffs had California driver's licenses and were headed to Las Vegas." 657 F.3d at 862 (Ikuta, J., dissenting). Walden did not learn of Fiore and Gipson's ties to Nevada until after the seizure was complete. *Id.* Walden simply could not have "expressly aimed" his relevant conduct—the seizure conduct that forms the basis of Fiore and Gipson's one claim—at Nevada. His "conduct and connection with the forum State" are therefore not "such that he should reasonably anticipate being haled into court

there." *Burger King Corp.*, 471 U.S. at 474 (internal quotation marks omitted).[1]

B

The panel decision also conflicts with cases in other circuits over how to interpret and to apply *Calder*'s express-aiming requirement. The majority of circuits have held that, under *Calder*, a defendant must expressly aim the conduct forming the basis of the claim *at the forum state*—not just at a known forum resident—before the courts of that state may exercise jurisdiction over the defendant. The Third and Fourth Circuits, for example, have held that a defendant "must 'manifest behavior intentionally targeted at and focused on' the forum for *Calder* to be satisfied." *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998) (quoting *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997)). The Tenth Circuit has aligned itself with the Third Circuit in concluding that *Calder* requires "that the forum state itself"—not just "a known forum resident"—"must be the focal point of the tort." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1074 n.9 (10th Cir. 2008) (internal quotation marks omitted). The Seventh Circuit has agreed with these courts, noting that *Calder* "made clear" that a defendant must "expressly aim[ ] its

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[1] Judge Ikuta has explained, in a compact and cogent way, that the panel decision "threatens a substantial expansion of the scope of personal jurisdiction" and departs from still other Supreme Court decisions affirming that personal jurisdiction "remains a vital part of due process and fair play." *See* 657 F.3d at 864 (Ikuta, J., dissenting). I endorse her analysis without attempting to replicate it.

actions at the state with the knowledge that they would cause harm to the plaintiff there." *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 445 (7th Cir. 2010). The law of other circuits is in accord. *See, e.g., Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010); *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 485-86 (5th Cir. 2008); *Noonan v. Winston Co.*, 135 F.3d 85, 90 (1st Cir. 1998); *United States v. Ferrara*, 54 F.3d 825, 830 (D.C. Cir. 1995); *see also Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994).

The panel majority divided our circuit from these courts by deeming the express-aiming requirement satisfied when (1) all of the defendant's relevant conduct was aimed at Georgia, and (2) the defendant had no knowledge of the Nevada-based effects of his relevant conduct. The panel made the requirements of due process mean something wholly different in our circuit than they do in other circuits. We should have corrected this by taking this case en banc.

C

The panel decision also deepens a conflict in our own circuit over how to interpret and to apply *Calder*'s express-aiming requirement.

Even before the panel decision here, our circuit had not always been precise when developing our jurisprudence under *Calder*. Some of our decisions have emphasized that under *Calder* a defendant must expressly aim his conduct at the forum, not just at a forum resident. *See, e.g., Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1158 (9th Cir. 2006)

(defendant's conduct must be "directed at" forum state); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004) (personal jurisdiction lacking in California because Ohio defendant's "express aim was local," not at California). But other decisions have suggested that a defendant may satisfy the express-aiming requirement just by targeting a known forum resident. *See, e.g.*, *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1073 (9th Cir. 2001) (personal jurisdiction in Nevada proper because defendant's allegedly tortious conduct "individually targeted" plaintiffs, who defendant "knew were Nevada residents" (internal quotation marks omitted)); *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (express-aiming requirement satisfied when "the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state").

This tension in our circuit law was cemented into a square conflict in *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124 (9th Cir. 2010), which upheld the exercise of personal jurisdiction because the defendant's allegedly tortious conduct individually targeted the plaintiff (a resident of the forum), even though the defendant did not expressly aim his conduct at the forum. *See id.* at 1129-30. This holding prompted a dissent calling out the majority for "disregard[ing] controlling circuit authority" requiring "conduct directly targeting the actual forum in question." *Id.* at 1132, 1133 (Reinhardt, J., dissenting) (internal quotation marks omitted). As the dissent explained, "*Pebble Beach* and *Schwarzenegger* establish that knowledge of the

plaintiff 's residence and a foreseeable harm to the plaintiff are, standing alone, insufficient to establish express aiming." *Id.* at 1134.

In this case the panel majority went even further than did the panel majority in *Brayton Purcell*. Until now, our cases at least recognized that a defendant must know about the plaintiff 's forum connections when he took the actions forming the basis of the plaintiff 's claims. *See, e.g.*, *Myers*, 238 F.3d at 1073 (defendant "knew [the plaintiffs] were Nevada residents"); *Bancroft & Masters, Inc.*, 223 F.3d at 1087-88. This was still clear after *Brayton Purcell*, where the defendant's sole forum connection was his knowledge of the plaintiff's residence. 606 F.3d at 1135 (Reinhardt, J., dissenting).

But the panel majority here abandoned even this requirement. By allowing personal jurisdiction when a defendant did not even know that the plaintiff was connected to the forum, the panel took circuit law even further from Supreme Court case law than it was before. This should have been corrected en banc.

IV

The panel majority seemed to recognize that if it just applied *Calder*, it would have had to affirm. Instead it waded into pendent personal jurisdiction law, with regrettable results.

Under the doctrine of pendent personal jurisdiction, a defendant may be required to defend against "a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have

personal jurisdiction." *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004). The doctrine rests on considerations of "judicial economy, avoidance of piecemeal litigation, and overall convenience of the parties." *Id.* at 1181.

But the doctrine does not jettison the requirements of due process. To exercise the doctrine, a court must actually possess jurisdiction over at least one claim. This requirement satisfies the fundamental fairness concerns that counsel against haling a defendant into court in a foreign forum. Once that connection to the forum is made and "a defendant must appear in a forum to defend against one claim, it is often reasonable to compel that defendant to answer other claims in the same suit arising out of a common nucleus of operative facts." *Action Embroidery*, 368 F.3d at 1181. But it is not reasonable —it violates due process—to make a defendant answer to a "pendent" claim when the court does not have jurisdiction over a single claim at all. We have therefore authorized application of this doctrine only when the district court has personal jurisdiction over at least one claim. *See CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076 (9th Cir. 2011); *CE Distrib., LLC v. New Sensor Corp.*, 380 F.3d 1107, 1113 (9th Cir. 2004); *Action Embroidery*, 368 F.3d at 1181. *Fiore* breaks from this authority and creates a conflict in our circuit law.

Because personal jurisdiction is analyzed by claim, other circuits have authorized pendent personal jurisdiction when the plaintiff has alleged at least one actual *claim* giving rise to personal

jurisdiction. By failing to respect those bounds of pendent personal jurisdiction—and relying instead on a nonclaim "aspect" of the case—the panel's ruling divides us from at least seven other circuits. *See United States v. Botefuhr*, 309 F.3d 1263, 1272 (10th Cir. 2002) ("Pendent personal jurisdiction . . . exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim."); *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1362 (Fed. Cir. 2001); *Robinson Eng'g Co. Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 449 (7th Cir. 2000); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 628-29 (4th Cir. 1997); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056-57 (2d Cir. 1993); *Oetiker v. Jurid Werke, G. m. b. H.*, 556 F.2d 1, 4-5 & n.10 (D.C. Cir. 1977); *Robinson v. Penn Cent. Co.*, 484 F.2d 553, 555-56 (3d Cir. 1973).

We should have reheard this case en banc to restore our circuit law on pendent personal jurisdiction and to bring it back in line with the decisions of other circuits.

V

It is rare that a panel of this court departs as substantially from controlling law and generates as many conflicts as the panel did in this case. The panel's holding breaks from binding authority, substantially broadens personal jurisdiction, and creates needless uncertainty in cases involving

conduct that may have effects in places that defendants cannot reasonably predict. We should have set the law right.

I respectfully dissent.

McKEOWN, Circuit Judge, with whom Judges GOULD, TALLMAN, CALLAHAN, BEA, IKUTA, and N.R. SMITH join, dissenting from the order denying rehearing en banc:

With the stroke of a pen, our circuit returns to a discredited era of specific personal jurisdiction, where foreseeability reigns supreme and purposeful direction is irrelevant. That approach was, of course, rejected in *Burger King Corp. v. Rudzewicz*; the Supreme Court was unequivocal that "foreseeability is not a sufficient benchmark for exercising personal jurisdiction." 471 U.S. 462, 474 (1985). Instead, the Due Process Clause requires that before a distant state exercises specific jurisdiction over a defendant, the defendant must purposefully direct activities at forum residents resulting in injuries arising out of or relating to those activities. Under the majority's construct, mere knowledge of the potential out-of-state plaintiff 's residence, along with a wrongful act, confers specific personal jurisdiction. This virtually limitless expansion of personal jurisdiction runs afoul of both due process guarantees and Supreme Court precedent.

A bare recitation of the facts reveals just how tenuous the forum (Nevada) connection is—individuals traveling to Nevada with California drivers' licenses had their Puerto Rico gambling winnings seized while in transit in Georgia. Drug Enforcement Administration agent Anthony Walden confiscated $97,000 in gambling winnings from Gina Fiore and Keith Gipson at the Atlanta airport. Walden told them that the money would be returned if they could demonstrate it was legitimately

obtained. Upon arriving in Nevada, Fiore and Gipson provided Walden with evidence that the money constituted legitimate gambling winnings. The Assistant United States Attorney ultimately agreed, and the money was returned seven months after it was seized. *Fiore v. Walden*, 657 F.3d 838, 843-44 (9th Cir. 2011).

In their complaint, Fiore and Gipson claim that Walden provided a false probable cause affidavit to the Assistant United States Attorney to support forfeiture proceedings. *Id.* They do not allege that Walden knew of their Nevada residence at the time of the seizure, a difficult claim to make since they presented California drivers' licenses. A close reading of the complaint shows they do not allege Walden knew of their Nevada residence even after the seizure. Because the allegations actually in the complaint are hardly sufficient to show express aiming, the panel opinion refers to "strong" indications that Walden came to know of Fiore and Gipson's Nevada residence after the initial taking, but before he prepared the allegedly misleading affidavit. *Id.* at 850. But even in their brief on rehearing, Fiore and Gipson equivocate, saying that "all indications" showed they "were not Georgia residents, and *likely* residents of Nevada *or* California" (emphases added).

A divided panel of our court held that Walden's preparation of the affidavit for the Assistant United States Attorney, with knowledge of Fiore and Gipson's residence, was sufficient purposeful direction at Nevada to sustain specific personal jurisdiction over Walden. *Id.* at 860. Dissenting,

Judge Ikuta correctly recognized that purposeful direction requires more than simply alleging that "the defendant knew [plaintiff 's] home state and subsequently engaged in some wrongful act." *Id.* at 864 (Ikuta, J., dissenting).

The purposeful direction requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475 (internal quotation marks omitted). Therefore, "'single or occasional acts' related to the forum may not be sufficient to establish jurisdiction if 'their nature and quality and the circumstances of their commission' create only an 'attenuated' affiliation with the forum." *Id.* n.18 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)).

Disregarding these constitutional limitations, the panel majority seizes upon a single act—Walden's affidavit, which ironically is not part of the district court or appellate record. For Nevada to constitutionally exercise jurisdiction over Walden based on the affidavit, he would need to be a "primary participant[ ] in an alleged wrongdoing intentionally directed at a [Nevada] resident." *Calder v. Jones*, 465 U.S. 783, 790 (1984). According to the complaint, Walden submitted a probable cause affidavit to a United States Attorney in Georgia regarding Puerto Rico gambling winnings seized in Atlanta. The affidavit was ostensibly aimed at continued retention of confiscated funds that Fiore and Gipson simply requested be returned to Nevada.

Nevada was neither a "focal point" nor relevant to the affidavit. *Id.* at 789. Since Fiore and Gipson's state of residence was both irrelevant and unknown during the initial taking, later knowledge of the potential forum state did not somehow alter the express aim of Walden's affidavit; the affidavit remained related to retention of funds seized in Georgia. Fiore and Gipson's state of residence remained irrelevant.

Asserting personal jurisdiction over Walden broadens the specific jurisdiction test from one requiring targeted "express aiming" to one where any attenuated foreign act with foreseeable effects upon a forum resident confers specific jurisdiction. To reach this result under controlling case law, the panel majority sidesteps Walden's contacts with Nevada, concluding instead that "Walden expressly aimed his actions at people and property he knew from the outset were *not* local." *Fiore*, 657 F.3d at 850. The leap from knowing someone is "not local" to expressly aiming at *Nevada* is hard to divine.

This approach turns jurisdictional principles inside out. Under the touchstone "minimum contacts" requirement, even though "it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts . . . the Court has consistently held that this kind of foreseeability is not a sufficient benchmark for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (internal quotation marks omitted); *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (rejecting "the broad proposition that a foreign act with foreseeable effects

in the forum state always gives rise to specific jurisdiction.").

Notably missing in the majority's expansive new standard is a limiting principle. Only a wholesale expansion of the personal jurisdiction doctrine to mimic pre-*Palsgraf* tort standards would allow Nevada jurisdiction over Walden. *See Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (limiting foreseeability doctrine in tort). Walden could not have known or even reasonably foreseen that airing his views to a Georgia prosecutor regarding proceeds seized in Atlanta from a transient airport passenger were somehow expressly aimed at the voyager's home state. Yet, what is not even foreseeable in modern-day tort is now "purposeful direction" in our circuit.

Reasonableness is the foundation of personal jurisdiction. *Burger King*, 471 U.S. at 477-78. For a defendant to reasonably anticipate" out-of-state litigation, it is "essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (citing *Int'l Shoe*, 326 U.S. at 319). If due process limitations on personal jurisdiction are to retain any guiding force, purposeful direction may not be collapsed into a diluted version of foreseeability. Because nothing is reasonable about returning to the unhinged, freeform foreseeability standard rejected by *Burger King* and *Calder*, I respectfully dissent from the order denying rehearing en banc.

OPPOSITION BRIEF

Supreme Court, U.S.
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No. 12-574

IN THE

Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a state may exercise personal jurisdiction over a defendant who (1) engages in intentional conduct (2) targeting victims he knows to be residents of that state while (3) knowing that the injuries he inflicts will be felt in that state.

2. Whether the court of appeals correctly considered the place where respondents experienced economic suffering as one relevant factor in its broader, multifactor determination that the District of Nevada is a proper venue for respondents' lawsuit under 28 U.S.C. § 1391(b)(2) because it is "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

I. Certiorari Is Not Warranted To Review The Ninth Circuit's Holding That Nevada Has Personal Jurisdiction Over This Suit. 9

A. There Is No Circuit Split Over *Calder*'s "Express Aiming" Requirement. 9

B. The Ninth Circuit's Personal Jurisdiction Holding Is Correct On The Merits. 21

II. The Ninth Circuit's Venue Holding Does Not Warrant This Court's Review. 27

A. There Is No Circuit Split That Affects The Result In This Case 28

B. The Ninth Circuit's Holding That The District Of Nevada Is A Proper Venue Is Correct. 30

III. This Case Is A Poor Vehicle For Addressing The Questions Presented. 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Action Embroidery Corp. v. Atl. Embroidery, Inc.,
368 F.3d 1174 (9th Cir. 2004) 33

Air Products & Controls, Inc. v. Safetech International, Inc.,
503 F.3d 544 (6th Cir. 2007) 20

Bancroft & Masters, Inc. v. Augusta Nat'l Inc.,
223 F.3d 1082 (9th Cir. 2000) 11, 14

Bates v. C&S Adjusters, Inc.,
980 F.2d 865 (2d Cir. 1992) 30

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,
403 U.S. 388 (1971) 4

Brainerd v. Governors of the Univ. of Alberta,
873 F.3d 1257 (9th Cir. 1989) 18

Brayton Purcell LLP v. Recordon & Recordon,
606 F.3d 1124 (9th Cir. 2010) 6, 11

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 22, 25

Central Freight Lines Inc. v. APA Transport Corp.,
322 F.3d 376 (5th Cir. 2003) 19

Cottman Transmission Sys., Inc. v. Martino,
36 F.3d 291 (3d Cir. 1994) 33

Cybersell, Inc. v. Cybersell, Inc.,
130 F.3d 414 (9th Cir. 1997) 16

Dakota Indus., Inc. v. Dakota Sportswear, Inc.,
946 F.2d 1384 (8th Cir. 1991) 18

Daniel v. American Board of Emergency Medicine,
428 F.3d 408 (2d Cir. 2005) 30

Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,
514 F.3d 1063 (10th Cir. 2008) ..... passim

Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc.,
618 F.3d 1153 (10th Cir. 2010) 31

ESAB Group, Inc. v. Centricut Inc.,
126 F.3d 617 (4th Cir. 1997) 17

Far W. Capital, Inc. v. Towne,
46 F.3d 1071 (10th Cir. 1995) 14

First Am. First, Inc. v. Nat'l Ass'n of Bank Women,
802 F.2d 1511 (4th Cir. 1986) 17

Haisten v. Grass Valley Med. Reimbursement,
784 F.2d 1392 (9th Cir. 1986) 18

Hanson v. Denckla,
357 U.S. 235 (1958) 22

Ibrahim v. Dep't of Homeland Security,
538 F.3d 1250 (9th Cir. 2008) 18

IMO Industries, Inc. v. Kiekert AG,
155 F.3d 254 (3d Cir. 1998) 16

International Shoe Co. v. Washington,
326 U.S. 310 (1945) 21

J. McIntyre Mach., Ltd. v. Nicastro,
131 S. Ct. 2780 (2011) 25

Janmark, Inc. v. Reidy,
132 F.3d 1200 (7th Cir. 1997) 15

Jenkins Brick Co. v. Bremer,
321 F.3d 1366 (11th Cir. 2003) 29, 31

Johnson v. Arden,
614 F.3d 785 (8th Cir. 2010) 17, 18, 19

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 22

Leroy v. Great W. United Corp.,
443 U.S. 173 (1979) 31, 32

Licciardello v. Lovelady,
544 F.3d 1280 (11th Cir. 2008) 12

Marks v. Alfa Grp.
(No. 10-57) 9

McFadin v. Gerber,
587 F.3d 753 (5th Cir. 2009),
cert. denied, 131 S. Ct. 68 (2010) 9, 19

Milliken v. Meyer,
311 U.S. 457 (1940) 21

Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A.,
623 F.3d 440 (7th Cir. 2010) 15

Myers v. Bennett Law Offices,
238 F.3d 1068 (9th Cir. 2001) 28

Noonan v. Winston Co.,
135 F.3d 85 (1st Cir. 1998) 20

Panavision Int'l, L.P. v. Toeppen,
141 F.3d 1316 (9th Cir. 1998) 15, 16

Panda Brandywine Corp. v. Potomac Electric Power Co.,
253 F.3d 865 (5th Cir. 2001) 19

Remick v. Manfredy,
238 F.3d 248 (3d Cir. 2001) 16

Reynolds v. International Amateur Athletic Federation,
23 F.3d 1110 (6th Cir. 1994) 21

Roberts v. Kauffman Racing Equip., L.L.C.
(No. 10-617) 9

Schwarzenegger v. Fred Martin Motor Co.,
374 F.3d 797 (9th Cir. 2004) 14

Setco Enters. Corp. v. Robbins,
19 F.3d 1278 (8th Cir. 1994) 32

Szulik v. TAG V.I., Inc.,
858 F. Supp. 2d 532 (E.D.N.C. 2012) 17

Tamburo v. Dworkin,
601 F.3d 693 (7th Cir.),
cert. denied, 131 S. Ct. 567 (2010) ..... passim

Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co.,
646 F.3d 589 (8th Cir. 2011) 17

Wallace v. Herron,
778 F.2d 391 (7th Cir. 1985) 15

Woodke v. Dahm,
70 F.3d 983 (8th Cir. 1995) 29

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 5, 22

Statutes

21 U.S.C. § 881(e)(1)(A) 2

28 U.S.C. § 1391(a)(2) 32

28 U.S.C. § 1391(b) (1988) 31

28 U.S.C. § 1391(b)(2) ..... passim

28 U.S.C. § 1404(a) 33

28 U.S.C. § 1406(a) 33

Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 31

Other Authorities

H.R. Rep. No. 101-734 (1990) 32

Moore, James Wm., et al., *Moore's Federal Practice* (3d ed. 2010) 31

Restatement (Second) of Conflict of Laws (1971) 10

Siegel, David D., *Commentary on 1988 and 1990 Revision of Section 1391*, 28 U.S.C.A. § 1391 31

U.S. DEA, *State and Local Task Forces*, http://www.justice.gov/dea/ops/taskforces.shtml (last visited Jan. 24, 2013) 2

Rules

Sup. Ct. R. 10 33

STATEMENT OF THE CASE

Respondents are Nevada residents. From Nevada, they sought the return of money that petitioner had wrongfully seized from them in Georgia. Petitioner then filed a false forfeiture affidavit to block respondents from recovering their money expeditiously. The Ninth Circuit held that respondents could sue petitioner in federal district court in Nevada. It held that Nevada had personal jurisdiction because petitioner knew and intended that his actions would injure respondents in Nevada. The court found venue proper because a substantial portion of the events giving rise to the claim occurred in Nevada.

1. On August 8, 2006, respondents were heading home to Las Vegas, Nevada after a business trip. Their business was professional gambling; their trip succeeded. They carried $97,000 in cash, composed of $67,000 in profit and $30,000 in "seed money" (also known as a "bank") that they had brought on the trip. Pet. App. 3a.

Respondents traveled from San Juan, Puerto Rico to Las Vegas, connecting in Atlanta. *Id.* 2a–3a. Apparently because they were carrying so much cash, agents in San Juan tested respondents' cash and bags for contraband; the tests came back negative. *Id.* 3a. Respondents were also questioned; all their answers proved truthful, and they properly disclosed the source of their funds. *Id.* 3a–4a; First Amended Compl. ¶ 37, *Fiore v. Walden*, No. 07-1674, Dkt. No. 11 (D. Nev. July 18, 2008) ("Compl.").

During their layover in Atlanta, petitioner approached respondents at the gate for their flight to

Las Vegas. Petitioner is a local police officer, deputized as a Drug Enforcement Administration (DEA) agent.[1] *Id.* 4a. Petitioner asked respondent Fiore several questions while respondent Gipson was sequestered and questioned separately. *Id.* 4a–5a. Fiore told petitioner that she did not have any contraband and that she was a professional gambler. *Id.* To demonstrate that her funds were acquired legitimately, she produced a trip log itemizing her winnings in various casinos. *Id.* Gipson explained that documents showing the legitimacy of his funds were in his checked luggage. *Id.* 5a.

Despite these explanations and documentary proof, petitioner ordered a sniff of respondents' bags by a drug-detecting dog. The dog did not react to Fiore's bag, indicating a negative result. *Id.* 5a; Compl., *supra*, ¶ 57. The dog then pawed at Gipson's bag once. On that basis, petitioner asserted probable cause to seize Gipson's cash as well as all the cash in Fiore's possession – notwithstanding that both respondents had passed screenings in San Juan, and that Fiore had provided petitioner with a log itemizing her casino wins. Pet. App. 5a.

Petitioner informed respondents that their funds would be returned only if they could provide documentation to show that the cash was legitimate. *Id.* Fiore asked petitioner to allow her to keep

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[1] Local agencies may receive a share of forfeited drug proceeds when their officers are deputized by the DEA. 21 U.S.C. § 881(e)(1)(A); U.S. DEA, *State and Local Task Forces*, http://www.justice.gov/dea/ops/taskforces.shtml (last visited Jan. 24, 2013).

enough money for a cab ride upon her return to Las Vegas. Petitioner refused. *Id.* Respondents then boarded the flight to Las Vegas. *Id.*

The next day, respondents' Nevada attorney contacted petitioner from Las Vegas to request the return of respondents' funds and to offer to provide the documentation needed to facilitate that return. Petitioner did not respond. Decl. of Anthony Walden ¶¶ 18–19, *Fiore v. Walden*, No. 07-1674, Dkt. No. 14-2 (D. Nev. Aug. 1, 2008). Subsequently, respondents, through their attorney, contacted petitioner from Las Vegas to provide additional documentation (such as win records, tax returns, and trip receipts) and reiterate their request for the return of their money. Pet. App. 5a–6a.

In response to the seizure, the DEA began an investigation. Petitioner provided the U.S. Attorney for the Northern District of Georgia with a false affidavit "to assist in bringing a forfeiture action." *Id.* 6a. Among other things, petitioner falsely swore in his affidavit that Gipson had been uncooperative, that respondents' separate answers were inconsistent, and that there was sufficient evidence to establish probable cause to forfeit the funds as drug proceeds. *Id.* Petitioner's affidavit also omitted exculpatory evidence of which he was aware, including the fact that both respondents had provided him with receipts that confirmed the legitimacy of a substantial portion of the funds. *Id.* 6a–7a.

Upon investigation, the U.S. Attorney's Office concluded that petitioner's probable cause affidavit was misleading because petitioner had purposefully omitted information favorable to respondents. *Id.* 7a. The DEA conducted its own background checks of

respondents, which came back "squeaky clean." *Id.* 6a.

Because petitioner filed the false affidavit, the return of respondents' money to Las Vegas was delayed for months as the U.S. Attorney's Office considered potential forfeiture proceedings. *Id.* 7a. That delay caused additional damages in Las Vegas, including the disruption of respondents' business activities. *Id.* 26a–27a.

With the intervention of respondents' attorney, and recognizing that respondents had done nothing unlawful, the U.S. Attorney's Office contacted respondents and offered to return their funds in exchange for a release of legal claims. After respondents refused, the government nonetheless returned the funds to respondents in Las Vegas, more than six months after the seizure. *Id.* 7a.

2. Respondents subsequently brought this lawsuit in federal district court in Nevada. As relevant here, respondents asserted a claim against petitioner under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The complaint alleges that petitioner violated respondents' Fourth Amendment rights in four separate ways: seizing the funds without probable cause, filing a probable cause affidavit known to be false, referring the matter for prosecution based on falsified and incomplete information, and continuing to hold the funds for six months after receiving proof that the funds were legal. Pet. App. 7a–8a.

Before discovery, the district court granted petitioner's motion to dismiss the complaint for lack of personal jurisdiction. *Id.* 8a. The court reasoned that because petitioner's *initial* seizure of the funds

occurred in and "was expressly aimed at Georgia," there was no personal jurisdiction in Nevada. *Id.* 71a. The court did not consider events, such as the filing of petitioner's false affidavit and the continued seizure of the funds, that occurred after respondents returned to Nevada. *Id.* 71a & n.1. The court found it unnecessary to address petitioner's claim that the District of Nevada was not a proper venue for the suit. *Id.* 66a.

3. The Ninth Circuit (Berzon, J.) reversed and remanded. *Id.* 2a. The court of appeals recognized that the case was controlled by this Court's holding in *Calder v. Jones*, 465 U.S. 783, 790 (1984), that personal jurisdiction over "primary participants in an alleged wrongdoing intentionally directed at a [forum state] resident" is proper "on that basis." The *Calder* Court held that California had personal jurisdiction over a suit by a California resident alleging that she had been libeled in a magazine article written and edited by two Florida residents with no other connections to California. The Court reasoned that the defendants wrote and "edited an article that they knew would have a potentially devastating impact" on the plaintiff, and "they knew that the brunt of that injury would be felt by [the plaintiff] in the State in which she lives and works and in which the [magazine] ha[d] its largest circulation." *Id.* at 789–90. The Court accordingly held that the defendants should "'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article." *Id.* at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

In this case, the Ninth Circuit applied its settled standard interpreting *Calder*: to establish personal jurisdiction, "the defendant allegedly must have [(a)] committed an intentional act, [(b)] expressly aimed at the forum state, [(c)] causing harm that the defendant knows is likely to be suffered in the forum state." Pet. App. 16a (alterations in original) (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)) (internal quotation marks omitted).

Drawing reasonable inferences from the complaint in respondents' favor, *id.* 16a, the Ninth Circuit found all three elements of the personal jurisdiction test satisfied, *id.* 28a–29a. First, petitioner's actions were obviously intentional. Second, there were several "strong" reasons to conclude that petitioner had expressly aimed his conduct at Nevada, especially because petitioner's preparation and submission of the false affidavit after respondents returned to Nevada "expressly target[ed] Fiore and Gipson in Nevada." *Id.* 20a. In particular:

- Petitioner knew that respondents were boarding a plane for Las Vegas, which he knew was their final destination. *Id.*; Decl. of Anthony Walden, *supra*, ¶ 13.
- Petitioner knew that respondents' funds had originated in Las Vegas and were returning there. Pet. App. 20a–21a.
- Petitioner received communications from respondents and their lawyer from Las Vegas. *Id.* 21a.
- Respondents' funds were ultimately returned to Las Vegas. *Id.* 22a.

- Petitioner knew that his actions would disrupt respondents' business activities in Las Vegas. *Id.* 27a.

Third, it followed that petitioner knew that the harms he caused were likely to be suffered in Nevada. *Id.* 27a–28a.

The Ninth Circuit also determined that the District of Nevada was an appropriate venue for respondents' lawsuit. *Id.* 42a. It emphasized that "[a]ll the economic injuries suffered by [respondents] were realized in Nevada," that their $30,000 "bank" had originated in Nevada, that petitioner's fraudulent probable cause affidavit was designed "to institute forfeiture proceedings against [respondents] after they had returned to their residences in Nevada," and that the case became ripe only when respondents' funds were returned to Nevada. *Id.* 41a–42a.

Judge Ikuta dissented in an opinion limited to the question of personal jurisdiction. She did not contest the court's holding that the district court had personal jurisdiction based on petitioner's filing of the false affidavit. Instead, she viewed respondents' complaint differently, as limited to petitioner's initial seizure of respondents' funds at the airport. *Id.* 54a–56a. Because respondents' complaint did not expressly allege that petitioner knew about respondents' significant ties to Nevada at the time of the seizure, she concluded, the court lacked personal jurisdiction. *Id.* 53a–54a.

4. Petitioner filed a petition for rehearing and rehearing en banc. The petition was denied over dissents by Judges O'Scannlain and McKeown, *id.* 77a, 91a, to which the panel majority responded. The

majority explained that Judge O'Scannlain, by failing to address its holding that the court had personal jurisdiction over the false affidavit claim, "criticizes an opinion we did not write." *Id.* 43a. And, the majority reiterated, the complaint's allegations demonstrated that Nevada was indeed the "focal point" of the events in the case: the funds had originated in Nevada and were intended to return there; they ultimately did return to Nevada; petitioner personally knew that the funds originated in and were returning to Nevada; and he knew that respondents "had substantial connections to that state." *Id.* 45a. Petitioner therefore "intentionally and directly – not just foreseeably or derivatively – target[ed] Nevada funds and persons." *Id.* 46a.

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to consider whether "due process permits a court to exercise personal jurisdiction over a defendant whose sole 'contact' with the forum State is his knowledge that the plaintiff has connections to that State." Pet. i. Whatever the answer to that question, this case does not present it. As petitioner must concede, the ruling below rested on respondents' well-pleaded allegations that petitioner committed an intentional tort, aimed at respondents, knowing that it would harm them in Nevada. Pet. App. 20a; *see* Pet. 22–23 (acknowledging the Ninth Circuit's holding that the express aiming requirement is met when "a plaintiff alleges that a defendant committed an intentional act aimed at the plaintiff with the knowledge that it will harm the plaintiff in the forum state").

Contrary to petitioner's contention, that holding is consistent with the precedent of every other circuit,

all of which agree that a state may exercise personal jurisdiction over a defendant who purposefully causes harm that he knows will be felt in the forum. Moreover, the decision below is correct on the merits. This Court has recently denied at least four petitions involving the "express aiming" requirement. *See Roberts v. Kauffman Racing Equip., L.L.C.* (No. 10-617); *Dworkin v. Tamburo* (No. 10-61); *Marks v. Alfa Grp.* (No. 10-57); *McFadin v. Gerber* (No. 09-1067). There is no reason for a different result here.

Nor is there any need for this Court to review the Ninth Circuit's holding that the District of Nevada is a proper venue for respondents' lawsuit. Once it is clear that personal jurisdiction is proper in Nevada, similar considerations establish that venue is appropriate as well.

I. Certiorari Is Not Warranted To Review The Ninth Circuit's Holding That Nevada Has Personal Jurisdiction Over This Suit.

A. There Is No Circuit Split Over *Calder*'s "Express Aiming" Requirement.

The Ninth Circuit held that Nevada could exercise personal jurisdiction over petitioner in this action principally because petitioner's tortious act of preparing a false forfeiture affidavit purposefully targeted people and funds that he knew had substantial connections to Nevada. Pet. App. 37a. When petitioner prepared the affidavit, he knew that respondents had returned to Nevada, that they were residents of Nevada, and that their Nevada counsel had contacted him and requested the return of the funds to that state. The purpose and effect of the false affidavit were that the government would

continue to hold the funds, preventing respondents from using them in Nevada. Thus, the court of appeals explained, petitioner's actions satisfied the requirement, recognized in *Calder v. Jones*, 465 U.S. 783, 789 (1984), that jurisdiction exists only if a defendant has "expressly aimed" his conduct at the forum state. Pet. App. 17a–27a.

Despite that straightforward and uncontroversial holding, petitioner attempts to conjure up a circuit split. Petitioner argues that the ruling below conflicts with the purported recognition by other circuits of a "difference between aiming conduct at a person who happens to be a resident of a given state and aiming conduct at the state itself." Pet. 21. But petitioner's alleged circuit conflict is illusory, constructed from a patchwork of question-begging quotations. In reality, no circuit requires a defendant to aim his conduct at the forum itself, as opposed to at its residents. Although different courts have unsurprisingly adopted slightly different formulations, they all apply the same basic rule as the Ninth Circuit, often while citing Ninth Circuit precedent: a state may exercise personal jurisdiction over a defendant who acts for the purpose of causing harm that he knows will be felt in that state. *See* Restatement (Second) of Conflict of Laws § 37 cmt. a (1971) (observing that personal jurisdiction exists when an act is performed "with the intention of causing effects in the state").

1. The Ninth Circuit applies *Calder*'s holding through a three-pronged test. An out-of-state defendant is subject to a state's personal jurisdiction if he has "[(a)] committed an intentional act, [(b)] expressly aimed at the forum state, [(c)] causing

harm that the defendant knows is likely to be suffered in the forum state." Pet. App. 16a (alterations in original) (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)) (internal quotation mark omitted).

Petitioner principally criticizes the Ninth Circuit's holding that the express aiming requirement is satisfied when the defendant targets a plaintiff who he knows has substantial connections to the forum. Pet. 13, 15; *see* Pet. App. 17a–27a; *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087–88 (9th Cir. 2000). In making that determination, "the critical factor is whether" the defendant "intended that the consequences of his actions would be felt by" someone in the forum. Pet. App. 24a. In this case, Nevada had jurisdiction over respondents' lawsuit because – by individually targeting respondents, who he knew had significant connections to Nevada – petitioner necessarily intended for harm to occur in Nevada.[2] *Id.* 25a–27a.

2. Petitioner contends that other circuits find personal jurisdiction only when the defendant "expressly aim[s] the conduct forming the basis of the claim *at the forum state* – not just at a known forum resident." Pet. 16 (quoting Pet. App. 84a (O'Scannlain, J., dissenting from denial of rehearing

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[2] In addition to the harm that petitioner knowingly caused respondents in Nevada with his false affidavit, petitioner also knowingly harmed them there by refusing respondent Fiore's request – made in the gate area for their flight to Las Vegas – to keep enough money for cab fare when they arrived at the airport. Pet. App. 5a.

en banc)).[3] But that distinction is merely semantic: because states are composed of individuals, defendants must be able to satisfy *Calder*'s requirements by targeting individuals.

Even a cursory examination of the decisions of other circuits confirms that, despite slight variations in their formulations, each agrees that intentionally causing harm within a state by targeting a known state resident satisfies *Calder*.[4] In some cases, courts may infer the requisite intent from other acts "aimed" at the state – in *Calder*, for instance, from the fact that the defendants' defamatory publication had a large California audience. But in cases like this one, in which the tort does not require other acts, *see* Pet. App. 26a (analogizing petitioner's conduct to fraud), the circuits agree that intentionally targeting a known forum resident is sufficient.

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[3] Judge O'Scannlain's dissent focused on the initial seizure of the funds, rather than on the false probable cause affidavit, which was the basis for the panel's opinion. *Compare* Pet. App. 83a (O'Scannlain, J., dissenting from denial of rehearing en banc) *with* Pet. 4 n.2 (conceding, for purposes of this Court's review, existence of separate false affidavit claim). Even if it is unclear from the record whether petitioner knew of respondents' Nevada connections when he seized their funds, he surely did when he filed the false affidavit, Pet. App. 44a, as he acknowledges in his Questions Presented, *see* Pet. i. Thus, whether there is a circuit split on the question identified by Judge O'Scannlain has no bearing on whether the decision below conflicts with those of other circuits.

[4] As petitioner concedes, the Eleventh Circuit follows the Ninth Circuit's test. Pet. 20–21 (citing *Licciardello v. Lovelady*, 544 F.3d 1280, 1287 (11th Cir. 2008)).

Petitioner's reliance on *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008); Pet. 18, is misplaced, as that case confirms that a defendant's intent to injure someone with significant connections to the forum state satisfies the express aiming requirement. There, two Colorado residents brought a declaratory judgment action in Colorado against two individuals who lacked direct contacts with the state. The plaintiffs alleged that their eBay auction would not infringe the defendants' copyright. They asserted personal jurisdiction on the basis of a copyright notice that the defendants had filed with eBay, which prompted eBay to cancel the auction. The Tenth Circuit held that the notice was sufficient to meet the express aiming requirement, notwithstanding that the defendants had mailed it to California rather than Colorado. *See* 514 F.3d at 1072, 1074–78. The court explained that although the copyright notice

> formally traveled only to California, it can be fairly characterized as an intended means to the further intended end of cancelling plaintiffs' auction in Colorado. . . . [The defendants'] "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket.

Id. at 1075. Notably, the Tenth Circuit found "support" for its holding in two Ninth Circuit decisions, both cited by the panel in this case:

Bancroft & Masters and *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004).[5]

The Seventh Circuit would also reach the same result as the Ninth Circuit in this case. In *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir.), *cert. denied*, 131 S. Ct. 567 (2010), the Seventh Circuit made clear that "[t]ortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder*'s express-aiming requirement." 601 F.3d at 707 (citing *Dudnikov*, 514 F.3d at 1078). Applying that rule, the court held that Illinois could exercise jurisdiction over out-of-state defendants who had "specifically aimed their tortious conduct at [the plaintiff] and his business in Illinois with the knowledge that he lived, worked, and would suffer the 'brunt of the injury' there," even though "their alleged defamatory and

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[5] In a footnote, the Tenth Circuit characterized its standard as "somewhat more restrictive" than the Ninth Circuit's, noting that "the forum state itself must be 'the focal point of the tort,'" so that "individually target[ing] a known forum resident" is insufficient. *Dudnikov*, 514 F.3d at 1063 n.9 (quoting *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995)). In fact, the Ninth Circuit imposes the same requirement through *Calder*'s third prong, which requires the defendant to know that the harm will be felt in the forum. *See, e.g.*, *Bancroft & Masters*, 223 F.3d at 1087. But even generously assuming that the courts apply a slightly different standard, and that that standard could change the outcome in a hypothetical case, it clearly makes no difference here, given this case's similarities to *Dudnikov*.

otherwise tortious statements were circulated more diffusely across the Internet."[6] *Id.* at 706.

Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A., 623 F.3d 440 (7th Cir. 2010); Pet. 18, is not to the contrary. In that case, the court found that Illinois lacked jurisdiction over a Texas-based defendant whose website's domain name allegedly infringed the Illinois plaintiff's trademark. But the defendant did not even know of the plaintiff's *existence*, much less that it was located in Illinois, when it registered the domain name. 623 F.3d at 440. Therefore, unlike in this case, the defendant's tortious actions in no way "targeted" a known forum resident. *See id.* at 446 (citing, inter alia, *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998)). The relevant distinction in both the Seventh and Ninth Circuits is not, as petitioner contends, whether the defendant somehow targets the forum state itself, as opposed to its residents. It is whether the harm felt in the forum state is intentional, rather than merely accidental or foreseeable.

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[6] The Seventh Circuit has implemented *Calder* in divergent ways over the years, with some cases arguably taking a broader approach than the one that prevails today. *See Tamburo*, 601 F.3d at 704; *compare Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997) (effects in forum state alone sufficient to support jurisdiction) *with Wallace v. Herron*, 778 F.2d 391 (7th Cir. 1985) (requiring express aiming in addition to in-forum effects). But as *Tamburo* makes clear, there is no conflict between the decision below and the test that the Seventh Circuit currently uses.

That distinction also explains the Third Circuit's decision in *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001); Pet. 17. Like the Tenth Circuit in *Dudnikov*, the Seventh Circuit in *Tamburo*, and the Ninth Circuit below, the *Remick* court found the express aiming requirement satisfied based solely on the defendants' intention to injure the plaintiff in the forum state. *See* 238 F.3d at 260 (holding that Pennsylvania had jurisdiction over defendants because "the effects of any intentional conduct by the defendants designed to interfere with [the plaintiff's] contractual relations with [his client] necessarily would have been felt in Pennsylvania").

Remick's treatment of another Third Circuit case on which petitioner relies, *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998); Pet. 17, further illustrates that the ruling below comports with the Third Circuit's precedent. Unlike in *IMO Industries*, the Third Circuit clarified, "where the German defendant's alleged tortious conduct appeared to have been expressly aimed at injuring a French company and not the in-forum plaintiff," in *Remick* the defendants' "alleged tortious conduct was expressly aimed at injuring [the plaintiff] in Pennsylvania."[7] 238 F.3d at 260.

Consistent with that rule, the Fourth Circuit has made clear that purposely harming a plaintiff in the

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[7] *IMO Industries* itself relied on two Ninth Circuit cases dealing with jurisdiction over intentional torts on the Internet. *See* 155 F.3d at 264 & n.7 (citing *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 415, 420 (9th Cir. 1997); *Panavision*, 141 F.3d at 1516).

forum state is sufficient to meet *Calder*'s express aiming requirement. *See First Am. First, Inc. v. Nat'l Ass'n of Bank Women*, 802 F.2d 1511, 1517 (4th Cir. 1986) (finding jurisdiction where the defendant "knew or should have known that its allegedly defamatory letters would inflict the greatest injury upon [the plaintiff] in the state in which he resided and conducted his business"); *see also Szulik v. TAG V.I., Inc.*, 858 F. Supp. 2d 532, 544 (E.D.N.C. 2012) (approvingly citing the Ninth Circuit's decision in this case in discussing express aiming). *ESAB Group, Inc. v. Centricut Inc.*, 126 F.3d 617 (4th Cir. 1997); Pet. 19, reflects that uniform approach. The *ESAB* court held that North Carolina could not exercise jurisdiction over a defendant who had allegedly stolen sales leads distributed across North America from a North Carolina company. The court reasoned that the defendant's North Carolina connections were too "attenuated and insubstantial" for its actions to have been expressly aimed there. 126 F.3d at 625–26.

The Eighth Circuit also would reach the same result as the Ninth Circuit in this case. That court has made clear that a state has jurisdiction over a nonresident defendant whose actions "are performed for the very purpose of having their consequences felt" in the forum state.[8] *Johnson v. Arden*, 614 F.3d

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[8] The Eighth Circuit has suggested that this inquiry is the functional equivalent of the commonly used three-pronged test. *Compare Johnson*, 614 F.3d at 796, *with Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co.*, 646 F.3d 589, 594 (8th Cir. 2011) (applying the prongs separately). That suggestion emphasizes the underlying consensus among the circuits. The

785, 796 (8th Cir. 2010) (quoting *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1390–91 (8th Cir. 1991) (citing *Brainerd v. Governors of the Univ. of Alberta*, 873 F.3d 1257, 1260 (9th Cir. 1989); *Haisten v. Grass Valley Med. Reimbursement*, 784 F.2d 1392, 1397 (9th Cir. 1986))). Although the Eighth Circuit found personal jurisdiction lacking in *Johnson v. Arden*, Pet. 16, that decision rested on the application of the same test to different facts. *See* 614 F.3d at 796 (defendant's defamatory statements were not targeted at a Missouri audience, indicating that the defendant did not *intend* to injure plaintiffs there).

Finally, the Fifth Circuit's cases are also fully consistent with the Ninth Circuit's. Although that

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first prong, an intentional act, should always be met because *Calder* applies only to intentional torts. And courts that apply the three-pronged test have noted the "overlap" between its second and third requirements – express aiming at the forum state and knowledge that the plaintiff will be injured in that state. *Dudnikov*, 514 F.3d at 1075 (explaining that the second prong focuses "on a defendant's intentions" while the third "concentrates on the consequences of the defendant's actions"); *accord Tamburo*, 601 F.3d at 704 ("consider[ing] the two requirements together" because of their similarities). Indeed, the Ninth Circuit has at times applied the exact same test as the Eighth Circuit. *See Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1259 (9th Cir. 2008) (jurisdiction exists when defendant's actions are "performed for the very purpose of having their consequences felt in the forum state" (quoting *Brainerd*, 873 F.3d at 1260) (internal quotation marks omitted)). In short, when a defendant acts with the intent to cause harm in the forum state, he satisfies *Calder* because he expressly aims at that state and knows that harm will be felt there. *See Tamburo*, 601 F.3d at 706.

court, like the Eighth Circuit in *Johnson*, does not explicitly apply *Calder* through three prongs, its rule has the same effect: "an act done outside the state that has consequences or effects within the state will suffice as a basis for jurisdiction . . . if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct." *McFadin v. Gerber*, 587 F.3d 753, 761 (5th Cir. 2009) (quoting *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 628 (5th Cir. 1999)) (internal quotation mark omitted), *cert. denied*, 131 S. Ct. 68 (2010). Beyond an intention to cause harm within the state, no additional "aiming" is required.

The decision in *Central Freight Lines Inc. v. APA Transport Corp.*, 322 F.3d 376 (5th Cir. 2003), illustrates the Fifth Circuit's approach. In that case, the defendant knew about the plaintiff's contractual relationship with another Texas company; acting with that knowledge, the defendant "intentionally attempted to interfere with that relationship" by holding "freight hostage in New Jersey and by manipulating the price of freight delivery in the northeast." *Id.* at 383–84. The court held that the defendant's intent to harm the plaintiff, with knowledge that he would feel the harm in Texas, was sufficient to support jurisdiction there. *Id.* at 384. Although petitioner cites *Panda Brandywine Corp. v. Potomac Electric Power Co.*, 253 F.3d 865 (5th Cir. 2001), as evidence of a circuit split, Pet. 19, that case applied the same test to readily distinguishable facts. *See* 253 F.3d at 869 (finding jurisdiction lacking when conduct was not directed at anyone specific and the plaintiff's allegations "only relate[d] to the foreseeability of causing injury" in the forum).

3. Petitioner claims that, although the First and Sixth Circuits have not "addressed the issue as clearly as" the other circuits on which he relies, they have nonetheless rejected the Ninth Circuit's express aiming rule. Pet. 20 n.6. This too is incorrect: those circuits follow the same test as the Ninth Circuit. In *Noonan v. Winston Co.*, 135 F.3d 85 (1st Cir. 1998); Pet. 20 n.6, the First Circuit held that jurisdiction over French defendants was improper, but it did so because the plaintiff did not allege any "intentional behavior." *Id.* at 90. Unlike in *Calder*, in which "the defendants' intentional conduct was '*calculated* to cause injury to respondent in California,'" *id.* (quoting *Calder*, 465 U.S. at 791), the defendant in *Noonan* did not even know that its defamatory publication would reach the forum state, *id.* at 91. Thus, nothing in the First Circuit's opinion suggests that *Calder* requires anything beyond an intent to harm an in-forum resident.

And in *Air Products & Controls, Inc. v. Safetech International, Inc.*, 503 F.3d 544 (6th Cir. 2007), the Sixth Circuit held that Michigan could exercise jurisdiction over a defendant who had allegedly engaged in a fraudulent transfer that injured a Michigan corporation. Applying *Calder*, the Sixth Circuit made clear that the defendant "transferred the assets with the intent to hinder, delay, or defraud Air Products"; that it "knew that Air Products had its principal place of business in Michigan, and that the focal point of its actions and the brunt of the harm would be in Michigan"; and that the purpose to harm

the plaintiff was sufficient for its result.[9] *Id.* at 552–53. Targeting a forum resident was thus sufficient for the Sixth Circuit to find express aiming.

B. The Ninth Circuit's Personal Jurisdiction Holding Is Correct On The Merits.

1. This Court's precedents establish two related propositions: causing foreseeable harm in a forum state, standing alone, is insufficient to support personal jurisdiction; but purposefully causing harm in the forum state *is* sufficient. Since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court has emphasized that whether a state may exercise personal jurisdiction over an out-of-state defendant depends on "traditional notions of fair play and substantial justice." *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted). Basing jurisdiction on the defendant's intent to cause harm furthers this fundamental principle by ensuring that jurisdiction

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[9] Petitioner cites *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994); Pet. 20 n.6, a defamation case. In *Reynolds*, however, the court (in contrast to *Calder*) inferred that the requisite purpose was missing because the defendant's allegedly defamatory press release was not intended to reach a forum-state audience. *See id.* at 1120 ("The fact that the [defendant] could foresee that the report would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction. [A]lthough [the plaintiff] lost Ohio corporate endorsement contracts and appearance fees in Ohio, there is no evidence that the [defendant] knew of the contracts or of their Ohio origin." (citation omitted)). As in the Ninth Circuit, foreseeability was insufficient for jurisdiction.

derives from "actions by the defendant *himself*," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), such that he "should reasonably anticipate being haled into court" in the forum, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). And just as it would be unfair to require a defendant to answer in a state based on the plaintiff's "unilateral activity," *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), so too would it be unfair to force a plaintiff to seek redress in the defendant's home state for an intentional injury, *see Calder v. Jones*, 465 U.S. 783, 790 (1984). Moreover, a state itself has a "significant interest in redressing injuries that actually occur within" its borders, regardless of their source. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776–77 (1984).

The defendants' intentions were at the heart of *Calder*, in which this Court held that California could exercise jurisdiction over a reporter and an editor who lived in Florida and contributed to an allegedly libelous magazine article about a California actress. *See* 465 U.S. at 791. This Court reasoned that the defendants were "not charged with mere untargeted negligence," but rather with "intentional, and allegedly tortious, actions" that were "expressly aimed at California," because "they knew" that their story "would have a potentially devastating impact" on the plaintiff "in the State in which she lives and works and in which the [magazine] has its largest circulation." *Id.* at 789–90.

Significantly, although petitioner attempts to focus on the ways in which the story in *Calder* was itself related to California, Pet. 23, this Court made clear that those facts were relevant only as evidence

indicating that the defendants knew that the story would harm the plaintiff there. *See Calder*, 465 U.S. at 790 ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California."). This case is on all fours with *Calder*: by purposely depriving respondents of money that he knew they needed for their business in Nevada, petitioner intended to injure them in Nevada, and respondents can seek redress for their injuries there.

2. As petitioner concedes, the decision below employed a widely used three-pronged test that implements *Calder*'s fact-intensive holding. Pet. 14–15. Petitioner nonetheless complains that under the Ninth Circuit's test, "[w]henever a plaintiff alleges that a defendant committed an intentional act aimed *at the plaintiff* with the knowledge that it will harm the plaintiff in the forum state – *i.e.*, whenever the plaintiff can meet the first and third prongs of *Calder*'s three-prong test – the Ninth Circuit would necessarily conclude that the second part . . . was also satisfied." Pet. 22–23 (emphasis added).

Petitioner is correct that such conduct would satisfy the Ninth Circuit's (and indeed every circuit's) test, because it would reflect the defendant's intent to cause harm in the forum state. But he is incorrect that those courts would thereby "collapse" *Calder*'s three requirements into two. *Id.* 23. In describing *Calder*'s first prong, petitioner ignores the obvious difference between an "intentional act" (the first prong of the standard) and an "intentional act aimed at the plaintiff" (petitioner's recharacterization of that standard). The court of appeals explained that

Calder's first prong could be satisfied even if the intentional act *was not* "aimed at the plaintiff." Instead, that issue is properly addressed under the "express aiming" prong, which is satisfied when there is "individual targeting" of forum residents. Pet. App. 17a–18a.

Regardless, nothing in *Calder* requires the three-pronged inquiry undertaken by the Ninth Circuit. Indeed, the Seventh and Tenth Circuits – both of which, according to petitioner, apply the "correct" test, *see* Pet. 18 – have noted an "overlap" between the second and third prongs of their tests. *See Dudnikov*, 514 F.3d at 1075; *Tamburo*, 601 F.3d at 704. Petitioner's argument thus has no bearing on whether the decision below is consistent with this Court's precedents.

Notwithstanding his earlier concession that the Ninth Circuit focused on the defendant's "*intentional* act *aimed* at the plaintiff with *knowledge* that it will harm the plaintiff in the forum state," Pet. 23 (emphasis added), petitioner next complains that the decision below erroneously employed a jurisdictional analysis based on mere foreseeability. *Id.* 23–24. But that allegation cannot be reconciled with the Ninth Circuit's opinion. The panel majority emphasized that petitioner's intent to harm respondents was central to its analysis:

> [T]he difference between those cases in which harm is merely foreseeable in the forum and those in which conduct is "expressly aimed" at the forum is often the difference between an *intended* impact that is either local or undifferentiated, and an *intended* impact that

> is targeted at a known individual who has a substantial, ongoing connection to the forum.

Pet. App. 19a. The court correctly concluded from the numerous steps petitioner took to deprive respondents of their money that he intended to injure them, *id.* 24a–27a, 45a–47a, and it correctly found that petitioner knew the injury would be felt in Nevada, *id.* 27a–29a. As a result, jurisdiction in Nevada was based on petitioner's own actions and intentions, making it reasonable to require him to answer for them there. *See Burger King*, 471 U.S. at 475–76.

3. Petitioner makes much of a supposed "difference between aiming conduct at a person who happens to be a resident of a given state and aiming conduct at the state itself." Pet. 21. Tellingly, however, petitioner never explains what would be involved in "aiming conduct at the state itself." In any case, the distinction that he draws finds no support in this Court's decisions. As *Burger King* recognized, this Court has "consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction" if the defendant purposefully directs his activities at "residents of another state." 471 U.S. at 476; *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (describing "intentional tort[s]" as an exception to the general principle that defendants must conduct activities within the forum state for jurisdiction to lie there). The rule could not be otherwise. Under petitioner's theory, a Georgia resident who singled out a Nevada resident and illegally withdrew the entire contents of her California bank account could not be sued in Nevada.

As the circuits uniformly agree, *Calder* does not require this absurd result. As long as the defendant intends harm within the forum state, jurisdiction there is proper and does not offend the Constitution.

4. Finally, petitioner significantly overstates the importance of this issue. Contrary to his contention, Pet. 26–28, the Ninth Circuit's decision does not mean that an airport employee can be haled into court in any state around the country simply because he injures a plaintiff en route to her eventual destination. The Ninth Circuit addressed (and dismissed) that possibility head on, carefully explaining that petitioner "did much more" than engage in "intentional tortious conduct aimed at a person . . . in transit at an airport." Pet. App. 37a. Instead, the court reiterated, petitioner "individually targeted [respondents] in Nevada" when he intentionally deprived them of their funds by filing a false probable cause affidavit, knowing that they had substantial connections to Nevada and would be injured there. *Id.* Thus, he "intentionally and directly – not just foreseeably or derivatively – target[ed] Nevada funds and persons."[10] *Id.* 47a.

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[10] Moreover, to the extent that petitioner complains about an alleged "burden" created by the express aiming test, any "burden" is properly considered under an entirely separate prong of the personal jurisdiction test, which focuses on whether the exercise of jurisdiction is reasonable. *See* Pet. App. 32a ("Burden of Defending in the Forum"). Perhaps wisely, petitioner does not seek review of the panel's conclusion that the "burden" factor "does not weigh in favor of [petitioner], although it would in all probability weigh in favor of many airport-connected defendants not associated with the federal government." *Id.* 33a.

II. The Ninth Circuit's Venue Holding Does Not Warrant This Court's Review.

The Ninth Circuit held that the District of Nevada was a proper venue for respondents' suit. Pet. App. 42a. In reaching that holding, the court explained that "[a]ll the economic injuries suffered by [respondents] were realized in Nevada, including their loss of use and interest on the funds for nearly seven months." *Id.* 41a. That injury was especially important to respondents because, as the court recognized, they rely on their "bank" as seed money for their business. *See id.* 27a.

But the place where respondents were injured was merely one factor that the court of appeals considered in its venue determination. The court also considered the sequence of events and omissions that gave rise to respondents' claim concerning petitioner's false affidavit, including the fact that respondents mailed documentation from Nevada showing the legitimacy of their money, that petitioner drafted his fraudulent affidavit after respondents had returned there, and that the arrival of respondents' money in Nevada was "the event that caused [their] cause of action to mature." *Id.* 41a–42a. Only after "[t]aking all these events together" did the Ninth Circuit conclude that a substantial part of the events or omissions giving rise to the claim occurred in Nevada. *Id.* 42a. Notably, Judge Ikuta's dissent did not dispute that conclusion. And although petitioner sought rehearing and rehearing en banc on this question, neither Judge O'Scannlain nor Judge McKeown saw fit to address it in their dissents from the denial of rehearing en banc.

A. There Is No Circuit Split That Affects The Result In This Case.

Petitioner contends that the Ninth Circuit's venue holding conflicts with the decisions of three other circuits. But here too the purported circuit split is overstated; petitioner conjures it up only by mischaracterizing both the holding of the court below and the holdings of the circuits on which he relies.

As an initial matter, petitioner mischaracterizes the Ninth Circuit's venue holding as resting solely on the fact that "respondents' claimed injury occurred in Nevada." Pet. 2. The petition omits that the locus of respondents' injury was just one "relevant factor" that the majority considered in determining that venue was proper in Nevada. Pet. App. 41a (quoting *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001)) (internal quotation mark omitted). The majority also considered the actions by petitioner that gave rise to respondents' claims. *Id.* 41a–42a. Indeed, only by glossing over the full breadth of the Ninth Circuit's analysis can petitioner argue that this case presents a circuit split over whether "the district in which the plaintiff is injured is 'a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.'" Pet. 31 (quoting 28 U.S.C. § 1391(b)(2)).

To bolster his allegations of a circuit split, petitioner suggests that, in supposed contrast with the decision below, three other circuits make venue determinations based exclusively on where "the alleged acts or omissions *by the defendant* took place." *Id.* 31. But here too petitioner mischaracterizes what those courts actually held.

Petitioner correctly observes that the Eighth Circuit has declined to find venue based solely on the plaintiff's residency and that it has instead focused on the defendant's activities. *Id.* 31–32 (citing *Woodke v. Dahm*, 70 F.3d 983 (8th Cir. 1995)). But petitioner ignores that the Eighth Circuit in *Woodke* also emphasized that the plaintiff had not adduced "*any other evidence*" that the events "giving rise" to his claim "occurred in the forum that he chose." 70 F.3d at 985 (emphasis added). That reasoning comports with the Ninth Circuit's in this case; the distinction is one of fact, not law, deriving from the fact that respondents here offered substantial evidence of events in Nevada giving rise to their claim, Pet. App. 41a–42a, while the plaintiff in *Woodke* did not.

Petitioner next asserts that the Eleventh Circuit "followed the same course [as the Eighth] in *Jenkins Brick Co. v. Bremer*," 321 F.3d 1366 (11th Cir. 2003), by holding that "[o]nly the events that directly give rise to a claim are relevant." Pet. 32 (second alteration in original) (quoting *Jenkins*, 321 F.3d at 1371). Elaborating on this standard, the Eleventh Circuit expressly "approve[d] of cases such as *Woodke*," concluding that the Eighth Circuit's "analytical framework, which considered as relevant only those acts and omissions that have a close nexus to the wrong, is a good interpretation of a statute." 321 F.3d at 1371–72. There is no tension between the ruling below and *Jenkins*: here, the Ninth Circuit held that venue was proper because "'a substantial part of the events or omissions giving rise to the claim occurred' in Nevada." Pet. App. 42a (quoting 28 U.S.C. § 1391(b)(2)).

Petitioner concludes his search for a circuit split with *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005), which he characterizes as "adopt[ing] the Eighth and Eleventh Circuits' holdings that only the defendant's acts and omissions are relevant under § 1391(b)(2)." Pet. 33. But the *Daniel* opinion itself belies that characterization, clarifying that the actual inquiry is "whether 'significant events or omissions material to [the plaintiff's claims] have occurred in the district in question.'" 428 F.3d at 432 (quoting *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005)). Indeed, the *Daniel* court observed that the *plaintiff's* receipt of something in the district could form "a substantial part of the events giving rise to a claim." 428 F.3d at 433 (citing *Bates v. C&S Adjusters, Inc.*, 980 F.2d 865, 868 (2d Cir. 1992)). Although the Second Circuit held that venue in the Western District of New York was improper, it did so *after* reviewing the lengthy list of actions giving rise to the plaintiffs' antitrust claims and concluding that the receipt of certain notices in that district by just six of the 176 plaintiffs was "only an insignificant . . . part of the events or omissions giving rise to" the claims. *Id.* at 434 (quoting 28 U.S.C. § 1391(b)(2)). In this case, by contrast, different facts evaluated under the same test led the Ninth Circuit to the opposite outcome – hardly the makings of a circuit split. Pet. App. 41a–42a.

B. The Ninth Circuit's Holding That The District Of Nevada Is A Proper Venue Is Correct.

This Court's review is not warranted for the further reason that the Ninth Circuit's venue holding

is correct on the merits. Venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). To make this determination, courts take into account the "entire progression of the underlying claim." *Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1166 (10th Cir. 2010) (quoting 17 James Wm. Moore et al., *Moore's Federal Practice* § 110.04[1] (3d ed. 2010)) (internal quotation mark omitted). And that is exactly what the Ninth Circuit did when it examined the series of actions leading to respondents' claim based on petitioner's filing of the false affidavit. Pet. App. 41a–42a.

Before the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, the venue statute provided that venue was proper in the judicial district "in which the claim arose." 28 U.S.C. § 1391(b) (1988). Courts had construed Section 1391(b)'s reference to the district where the claim arose as "demand[ing] that one place, and one place only, be pinpointed" as the proper venue. David D. Siegel, *Commentary on 1988 and 1990 Revision of Section 1391*, 28 U.S.C.A. § 1391; *see, e.g.*, *Leroy v. Great W. United Corp.*, 443 U.S. 173, 186 (1979) (comparing two venues and noting that the location of impact on the plaintiff in one "f[e]ll far short of [the contacts] connecting the claim" to the other). As a result, venue determinations were "hard if not impossible to do in many cases." Siegel, *supra*; *see also Jenkins*, 321 F.3d at 1371.

The 1990 amendments responded to these difficulties; indeed, Congress's purpose in enacting the changes was to "avoid[]" both "the litigation breeding phrase 'in which the claim arose'" and "the

problem created by the frequent cases in which substantial parts of the underlying events have occurred in several districts." *See* H.R. Rep. No. 101-734, at 23 (1990). Under the statute as amended, venue is now proper – as the Ninth Circuit held in this case – where significant events or omissions material to the plaintiff's claim have occurred, "even if other material events occurred elsewhere." *Gulf Ins. Co.*, 417 F.3d at 357; *see also Setco Enters. Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir. 1994) ("Under the amended statute, we no longer ask which district among two or more potential forums is the 'best' venue . . . .") (construing Section 1391(a)(2)).

Neither the current text of Section 1391(b)(2) nor the history of the statute suggests that judges ought to look exclusively at a defendant's actions while making substantiality analyses. Yet petitioner still argues that venue can be proper only in the Northern District of Georgia because that was where he seized respondents' funds. But the proper inquiry is where a substantial part of the events giving rise to respondents' continued-seizure claim occurred; thus, the Ninth Circuit was correct to consider facts such as the return of respondents' funds to Nevada because those facts constituted a substantial part of the events giving rise to respondents' claims. Pet. App. 41a–42a.

Finally, petitioner cites *Leroy* for the proposition that the venue statute protects defendants from "the risk that a plaintiff will select an unfair or inconvenient place of trial." 443 U.S. at 184; Pet. 34–35. But the ruling below was consistent with *Leroy*. In making its venue determination, the Ninth Circuit looked at whether a "substantial" part of the events

and omissions giving rise to respondents' claim occurred in Nevada. Pet. App. 42a. That substantiality requirement itself protects defendants by ensuring that they are "not haled into a remote district having no real relationship to the dispute." *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). Moreover, other safeguards remain: defendants – including petitioner – may still argue that venue is improper under 28 U.S.C. § 1406(a) or proper but inconvenient under 28 U.S.C. § 1404(a). *See Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1181 (9th Cir. 2004).

III. This Case Is A Poor Vehicle For Addressing The Questions Presented.

Even if the questions presented were appropriate for this Court's consideration, this case would be a poor vehicle for addressing them. With respect to personal jurisdiction, although petitioner purports to identify a circuit split regarding the legal standard governing "express aiming," his real complaint is that the Ninth Circuit misapplied the standard that it chose. *See* Pet. 22 (arguing that the Ninth Circuit "paid lip service" to the correct three-pronged test). As a general rule, this Court does not grant certiorari simply to review the application of law to fact. Sup. Ct. R. 10.

Further, this case is interlocutory. Because the district court granted petitioner's motion to dismiss before holding any evidentiary hearing, numerous facts regarding both personal jurisdiction and venue

remain disputed and could be further developed on remand, perhaps alleviating any need for this Court's review.[11] Moreover, if the lawsuit goes forward, petitioner will doubtless attempt to assert that he is entitled to qualified immunity, and the lower courts' resolution of that defense could also obviate the need for this Court's intervention.

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[11] Among other things, the parties dispute whether the Ninth Circuit correctly inferred from respondents' allegations that petitioner intentionally targeted respondents while knowing about their Nevada connections. *See* Pet. App. 26a–27a. Because that conclusion is central to the analysis in this case, granting review might require this Court to decide whether the Ninth Circuit applied the correct legal standard regarding the kinds of inferences that may be drawn from a complaint – a question that was neither raised in the petition nor well-developed below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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January 24, 2013

REPLY BRIEF

Supreme Court, U.S.
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No. 12-574

In the
Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Reply brief for petitioner 1
A. The personal-jurisdiction issue warrants review 1
B. The venue issue warrants review 8
C. No vehicle problems exist 11
Conclusion 13

TABLE OF AUTHORITIES

Cases

Bancroft & Masters, Inc. v. Augusta Nat'l Inc.,
223 F.3d 1082 (9th Cir. 2000) 2

Calder v. Jones,
465 U.S. 783 (1984) 1, 6

Cent. Freight Lines Inc. v. APA Transp. Corp.,
322 F.3d 376 (5th Cir. 2003) 5, 6

Daniel v. Am. Bd. of Emergency Med.,
428 F.3d 408 (2d Cir. 2005) 9

Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,
514 F.3d 1063 (10th Cir. 2008) 2, 3, 7

ESAB Grp., Inc. v. Centricut, Inc.,
126 F.3d 617 (4th Cir. 1997) 4, 5

Imo Indus., Inc. v. Kiekert AG,
155 F.3d 254 (3d Cir. 1998) 2, 4

J. McIntyre Mach., Ltd. v. Nicastro,
131 S. Ct. 2780 (2011) 2, 12

Jenkins Brick Co. v. Bremer,
321 F.3d 1366 (11th Cir. 2003) 8, 9

Johnson v. Arden,
614 F.3d 785 (8th Cir. 2010) 5

Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.,
623 F.3d 440 (7th Cir. 2010) 1, 3

Remick v. Manfredy,
238 F.3d 248 (3d Cir. 2001) 4

Tamburo v. Dworkin,
601 F.3d 693 (7th Cir. 2010) 3

Woodke v. Dahm,
70 F.3d 983 (8th Cir. 1995) 8

Statutes

28 U.S.C. § 1391(b)(2) 8, 9, 10, 11

28 U.S.C. § 1406(a) 11

Rules

Fed. R. Civ. P. 12 12

REPLY BRIEF FOR PETITIONER

This case cleanly presents two questions worthy of this Court's review. Respondents' attempts to deny that reality crumble under scrutiny.

A. The Personal-Jurisdiction Issue Warrants Review

1. The circuits are split over the express-aiming requirement in *Calder v. Jones*, 465 U.S. 783 (1984). Pet. 13–22. Although the Ninth and Eleventh Circuits hold that a defendant's intent to harm a plaintiff with known forum-state connections suffices, most circuits hold that "*Calder* requires more." *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440, 447 (7th Cir. 2010). The majority view, as Judge O'Scannlain and four other judges explained below, is that "a defendant must expressly aim the conduct forming the basis of the claim *at the forum state*—not just at a known forum resident." App. 84a.

a. Seeking to explain away the split, respondents contend that the distinction between aiming conduct at a state and aiming conduct at a known resident is "merely semantic." BIO 12. As they have it, "because states are composed of individuals, defendants must be able to satisfy *Calder*'s requirements by targeting individuals." *Id.*

Respondents are wrong. A state is no mere conglomeration of prospective plaintiffs; it is a distinct, sovereign entity. The question in personal-jurisdiction cases is not what the defendant's relationship with *the plaintiff* is, but whether the defendant has, by his actions, "submit[ted] to the

judicial power of" the forum state, "an otherwise foreign sovereign." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (plurality op.); see also *id.* at 2793 (Breyer, J., joined by Alito, J., concurring in the judgment); Pet. 24–25. For this reason, due process does not permit a state to exercise jurisdiction over a defendant based on nothing more than a connection to the plaintiff. *Ibid.* Instead, the forum state itself must have been the "focal point" of the defendant's conduct, because only then has the defendant "'entered' the state in some fashion." *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998).

b. Apart from denying the difference between aiming at a state and aiming at a person who happens to be a resident, respondents' opposition to certiorari consists of denying that the courts that have said the former is required meant what they said.

Respondents first contend that *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008), "confirms that a defendant's intent to injure someone with significant connections to the forum state" is enough. BIO 13. That is how the Tenth Circuit described the Ninth Circuit's approach of holding *Calder*'s express-aiming requirement "satisfied when the defendant 'individually target[s] a known forum resident.'" 514 F.3d at 1074 n.9 (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)). But far from adopting that approach, the Tenth Circuit noted that it has "taken a somewhat more restrictive approach, holding that the forum state itself must be

the 'focal point of the tort.'" *Id.* And *Dudnikov* found *Calder* satisfied not merely because the defendants targeted the plaintiffs but because they had "reached into Colorado" to "cancel[] plaintiffs' auction in Colorado." *Id.* at 1075.

Respondents next assert that *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), shows that "[t]he Seventh Circuit would also reach the same result as the Ninth Circuit in this case." BIO 14. But *Tamburo* itself acknowledged the split that respondents deny. 601 F.3d at 704 (contrasting Ninth Circuit's approach with that of Third, Fourth, and Tenth Circuits). As for *Mobile Anesthesiologists*, respondents stress that "the defendant did not even know of the plaintiff's *existence*, much less that it was located in Illinois, when it registered the domain name." BIO 15. Respondents fail to mention that the defendants later learned the plaintiff's "identity, location, and ownership of a similar mark," 623 F.3d at 444, and the plaintiff argued, like respondents here, that "[f]rom that time forward . . . [the defendant] was intentionally directing its tortious activities at Illinois." *Id.* at 446. That was enough for the Ninth Circuit, which equated conduct aimed at respondents with conduct aimed at Nevada. App. 47a ("Walden intentionally targeted persons and funds with substantial connections to Nevada. He thus expressly aimed his conduct at that state . . . ."). But it was not enough for the Seventh Circuit, which recognized that *Calder* requires more than "the plaintiff's mere residence in the forum state." 623 F.3d at 447.

The Third Circuit's precedent is the next victim of respondents' whitewashing efforts. According to respondents, *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001), found express aiming "based solely on the defendants' intention to injure the plaintiff in the forum state." BIO 16. In truth, however, *Remick* held that the alleged tortious interference was aimed at Pennsylvania not merely because the plaintiff suffered injury there, but because the contract at issue was performed there. 238 F.3d at 260. What is more, the court made clear that the location of the contractual relationship was critical by finding *no* express aiming on the plaintiff's defamation claim: Although the defendants aimed their statements at the plaintiff in Pennsylvania and "the brunt of the harm" was suffered there, *id.* at 258, "it cannot be said that the defendants here expressly aimed their conduct at Pennsylvania so that Pennsylvania was the focal point of the tortious activity." *Id.* at 259. If "intention to injure the plaintiff in the forum state" truly sufficed, BIO 16, *Remick* would have upheld jurisdiction over that claim too. Instead, it reiterated *Imo Industries*' admonition that simply "asserting that the defendant knew that the plaintiff's principal place of business was located in the forum [is] insufficient . . . ." *Remick*, 238 F.3d at 258; see Pet. 17.

Respondents' arguments go further downhill from there. They claim that *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997), reflects the supposedly "uniform approach" embodied by the decision below. BIO 17. In fact, the Fourth Circuit made clear that intending to harm a known forum resident is *not* enough, as "such knowledge and

intent is too attenuated to constitute a 'substantial connection' with [the forum]." 126 F.3d at 625. Respondents correctly report the court's conclusion that "the defendant's North [*sic*; South] Carolina connections were too 'attenuated and insubstantial' for its actions to have been expressly aimed there," BIO 17, but omit the reason: the defendant had no connection to South Carolina other than having allegedly targeted a known resident—precisely the "connection" that the Ninth Circuit held sufficient.

Equally egregious is respondents' claim that *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010), "rested on the application of the same test [as applied by the Ninth Circuit] to different facts." BIO 18. If the circuits really "agree[d] that intentionally targeting a known forum resident is sufficient," BIO 12, *Johnson*, too, would have come out the other way: the defendant's allegedly defamatory "statements were aimed at the Johnsons" with obvious knowledge of their Missouri connections, as the statements themselves noted that the Johnsons' business was located there. 614 F.3d at 796. Yet the Eighth Circuit distinguished between aiming at known Missourians and aiming "at Missouri" and held jurisdiction lacking because the Johnsons failed to show the latter. *Id.*

Respondents submit that their "uniform approach" prevails in the Fifth Circuit as well. They tell the Court that *Central Freight Lines Inc. v. APA Transport Corp.*, 322 F.3d 376 (5th Cir. 2003), "held that the defendant's intent to harm the plaintiff, with knowledge that he would feel the harm in Texas, was sufficient to support jurisdiction there." BIO 19.

Contrary to respondents' misleading description, the Fifth Circuit relied not merely on the defendant's knowledge, but rather on its "interference with the contractual relationship of two Texas-based companies whose business dealings are based in Texas." 322 F.3d at 384. Indeed, the Fifth Circuit distinguished between conduct directed toward the plaintiff and conduct "purposefully directed toward the forum state," *id.* at 383—the distinction that respondents reject as "merely semantic"—and took pains to clarify that the "fortuity" that a victim of an intentional tort resides in the forum state is insufficient, *id.* at 384 n.7.

In short, the split is real, as both the dissenting judges below and other circuits have recognized. That respondents can argue to the contrary only by mischaracterizing key cases simply underscores that reality.

2. As for respondents' arguments on the merits, it largely suffices here to note that *Calder*'s susceptibility to such sharply contrasting readings shows why certiorari is needed. Nonetheless, respondents' assertion that "[t]his case is on all fours with *Calder*," BIO 23, cannot be taken seriously. If mere intent to harm a known forum resident were enough, *Calder* would not have emphasized the numerous other ways that the defendants' conduct was focused on California. See 465 U.S. at 788–89; Pet. 23. Although respondents contend that *Calder* emphasized those facts solely to show that "the defendants knew that the story would harm the plaintiff there," BIO 23, that is not a fair reading of

the opinion, nor is it how most lower courts have read it.

Respondents also miss the mark in complaining that petitioner "never explains what would be involved in 'aiming conduct at the state itself.'" BIO 25. The cases described above furnish examples of conduct with a nexus to the forum state itself going beyond knowledge of the eventual plaintiff's residence. For example, "reach[ing] into Colorado" to force the cancellation of an auction there may well constitute aiming conduct at Colorado. *Dudnikov*, 518 F.3d at 1075. Respondents, however, do not allege that petitioner took any action in Nevada, directed anyone to take any action in Nevada, or had any connection to Nevada other than allegedly intending to injure respondents while knowing that *they* had connections to Nevada. Here, accordingly, it is dispositive whether that "connection" between petitioner and Nevada is sufficient. Pet. 22–25.

3. Respondents finally argue that the decision below is unimportant, downplaying the risk that airport employees "can be haled into court in any state around the country" under the Ninth Circuit's approach. BIO 26. But that is exactly the upshot of the decision below. In many encounters between a law-enforcement officer and a citizen—from TSA agents performing airport security checks to local police officers making traffic stops—the officer will check the citizen's identification, thereby learning where he lives. In the Ninth Circuit, that knowledge suffices to drag the officer across the country to defend his good name and personal finances whenever a plaintiff alleges an intentional tort.

B. The Venue Issue Warrants Review

1. There is a square split regarding how to determine whether a district is one "in which a substantial part of the events or omissions giving rise to the claim occurred" under 28 U.S.C. § 1391(b)(2): three circuits look exclusively to acts and omissions *by the defendant*, while the Ninth Circuit considers also the place of the *plaintiff's injury*. Pet. 31–33. Respondents can call this split "overstated" (BIO 28) only by misstating the case law.

Respondents concede that *Woodke v. Dahm* "focused on the defendant's activities," but dismiss it as factually distinguishable, stressing the court's observation that "the plaintiff had not adduced 'any other evidence' that the events 'giving rise' to his claim 'occurred in the forum that he chose.'" BIO 29 (quoting 70 F.3d 983, 985 (8th Cir. 1995)) (emphasis omitted). The Eighth Circuit made that observation, however, only after decisively rejecting the argument that the plaintiff's injury could constitute an "event[]" "giving rise to" a claim under § 1391(b)(2). That Woodke pointed to no relevant events or omissions in the forum district—*i.e.*, nothing other than his injury—explains why he lost. It does not explain away the split over whether the plaintiff's injury counts as a relevant "event" or "omission."

As to *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366 (11th Cir. 2003), respondents assert that there is "no tension between the ruling below and *Jenkins*" because "here, the Ninth Circuit held that venue was proper because a substantial part of the events or omissions giving rise to the claim occurred in Nevada." BIO 29 (internal quotation marks omitted).

But that whistles past the real issue: The Ninth Circuit found the statute satisfied by focusing on the location of respondents' alleged injury, while the Eleventh Circuit held that only the defendant's conduct counts as a relevant "event" or "omission." See 321 F.3d at 1371–72 (approving of *Woodke*'s holding that Congress "'meant to require courts to focus on relevant activities of the defendant, not of the plaintiff'").

Respondents similarly try to distinguish *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005), on the ground that it held that "the actual inquiry is whether significant events or omissions material to the plaintiff's claims have occurred in the district in question." BIO 30 (brackets and quotation marks omitted). But no one disputes that that is the "actual inquiry" under § 1391(b)(2); it is what the statute's text says. The real question, which respondents continue to beg, is *what counts* as an "event" or "omission"? *Daniel* aligned the Second Circuit with the Eighth and Eleventh Circuits in holding that only the defendant's actions count. See 428 F.3d at 432–34 (quoting *Woodke* and *Jenkins Brick* approvingly). Respondents misunderstand *Daniel*'s reference to a "half-dozen letters" that one defendant had sent into the forum district. *Id.* at 434; BIO 30. The court considered those letters only insofar as they constituted part of the "series of actions *by defendants*" that the plaintiffs challenged, concluding that their transmission "constitute[d] only an insignificant and certainly not 'a substantial part of the events or omissions giving rise to [plaintiffs' claims].'" 428 F.3d at 434 (emphasis added).

2. On the merits, rather than defend the Ninth Circuit's reasoning that the plaintiff's injury is an "event[] or omission[] giving rise to the claim," respondents change the subject. First, they seek to rehabilitate the decision below by stating that it "also considered the actions by petitioner that gave rise to respondents' claims." BIO 28. But not even respondents suggest that the decision below considered any actions by petitioner that—as § 1391(b)(2) requires—"occurred" in Nevada, for it is undisputed that there were no such actions. The Ninth Circuit may have considered actions by petitioner that occurred in Georgia, but that hardly justifies its decision that venue lay in Nevada.

Next, in search of some event that occurred in Nevada, respondents argue that "the Ninth Circuit was correct to consider facts such as the return of respondents' funds to Nevada." BIO 32. But the "events" and "omissions" that "g[ave] rise" to respondents' claim are the seizure of the cash and the failure to return it sooner. Getting their money back is the *opposite* of what respondents are complaining about. The court below stated that "[t]he arrival of the funds in Nevada was the event that caused [respondents'] cause of action to mature," App. 42a, but even if that is true for statute-of-limitations purposes it cannot transform the money's return from an event that benefited respondents into an event that gave rise to their claim. And in any case, petitioner played no role in the return of the money, so—as three circuits hold—it is legally irrelevant to the venue analysis. See Am. Compl. ¶¶ 106, 109 (alleging that Assistant U.S. Attorney decided to

return the cash and that petitioner had refused to return it).

3. Respondents finally assert that the venue question is unimportant because "other safeguards remain: defendants—including petitioner—may still argue that venue is improper under 28 U.S.C. § 1406(a) . . . ." BIO 33. What respondents mean is a mystery. Section 1406(a) imposes no venue requirements separate from § 1391(b)(2); instead, it merely authorizes courts to dismiss or transfer cases for which venue is improper. Venue cannot be "improper" under § 1406(a) if it is proper under § 1391(b)(2).

In short, bereft of legitimate reasons why certiorari is unwarranted, respondents stoop to fictional ones.

C. No Vehicle Problems Exist

Respondents conclude with a half-hearted attempt, occupying less than a page, to manufacture vehicle problems. They argue that petitioner's "real complaint" is that the decision below merely "misapplied" the express-aiming standard. BIO 33. As the petition makes clear, petitioner's complaint is that the Ninth Circuit eviscerated that standard by equating intentional conduct directed at the plaintiff with express aiming at the forum state. Some personal-jurisdiction cases may be complicated or fact-bound, but the dispute here is purely legal and could not be more cleanly presented given that the only "connection" between petitioner and Nevada was petitioner's knowledge that *respondents* had connections to Nevada.

Respondents next argue that the case is "interlocutory." BIO 33. Why that is a reason to deny certiorari here is unclear; nothing that could happen on remand will change the Ninth Circuit's erroneous legal standards. Moreover, venue and personal-jurisdiction issues are routinely resolved at the pleading stage, see Fed. R. Civ. P. 12(b)(2)–(3), and this Court has not hesitated to take cases arising in this identical posture. See, *e.g.*, *J. McIntyre*, *supra*.

Respondents' final suggestion that certiorari is unwarranted because petitioner may be entitled to qualified immunity, BIO 34, is misconceived. To be sure, because respondents' allegations of misconduct by petitioner are false, petitioner fully expects to win on qualified-immunity or other grounds if he is forced to litigate in Nevada. But the point of personal-jurisdiction and venue rules is to protect defendants from having to defend in distant forums in the first place. It is no answer to the Ninth Circuit's erroneous rulings on those important threshold issues to say that petitioner may ultimately prevail on other grounds.

Finally, it bears noting that respondents' unsolicited BIO substantially refines the arguments they made below. Compare, *e.g.*, BIO 21–26 with Opening C.A. Br. 22–30. That assures that the issues would be fully developed in any merits briefing. It also reveals that respondents recognize that the case for certiorari is stronger than they wish to let on.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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February 6, 2013

JOINT APPENDIX

SUPREME COURT, U.S.
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No. 12-574

In the

Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed: November 6, 2012
Certiorari Granted: March 4, 2013

TABLE OF CONTENTS

Relevant district court docket entries 1

Relevant court of appeals docket entries..... 7

First amended complaint (July 18, 2008)..... 13

Motion to dismiss first amended complaint (Aug. 1, 2008) 37

Declaration of Anthony Walden (Aug. 1, 2008)..... 39

District court judgment (Oct. 21, 2008)..... 44

The following have been omitted here because they are reproduced in the appendix to the petition for certiorari:

Court of appeals opinion (Sept. 12, 2011; amended Aug. 8, 2012).... Pet. App. 1a

District court order granting motion to dismiss (Oct. 17, 2008)..... Pet. App. 65a

Order denying petition for rehearing and dissents from denial thereof (Aug. 8, 2012)..... Pet. App. 75a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. 2:07-cv-01674-ECR-LRL

GINA FIORE AND KEITH GIPSON

v.

ANTHONY WALDEN AND THREE UNKNOWN AGENTS/ATTORNEYS WITH THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION

RELEVANT DOCKET ENTRIES

Date	#	Document
12/14/2007	1	COMPLAINT *Against all Defendants filed by Gina Fiore, and not* against Gina Fiore.
12/14/2007	–	Case assigned to Judge Edward C. Reed, Jr. and Lawrence R. Leavitt. (MAJ).
12/14/2007	2	SUMMONS Issued as to Anthony Walden.
* * *		

02/23/2008	4	SUMMONS Returned Executed by Gina Fiore, Keith Gipson re 1 Complaint, 2 Summons Issued as to USA. Anthony Walden served on 2/14/2008, answer due 3/5/2008.
		* * *
05/30/2008	7	MOTION to Permit Appearance of Government Attorney. Attorney: Andrew D. Silverman by Defendant Anthony Walden. Motion ripe 5/30/2008.
06/04/2008	8	ORDER granting 7 Motion for Leave to Appear for Attorney Andrew D Silverman for Anthony Walden. Signed by Magistrate Judge Lawrence R. Leavitt.
06/30/2008	9	First MOTION to Dismiss for Lack of Jurisdiction *and Improper Venue* by Defendant Anthony Walden.

06/30/2008	10	First MEMORANDUM filed by Defendant Anthony Walden re 9 First MOTION to Dismiss for Lack of Jurisdiction *and Improper Venue. Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Personal Jurisdiction and Improper Venue* (Attachments: # 1 Declaration by Defendant Michael Anthony Walden in Support of Motion to Dismiss)
07/18/2008	11	AMENDED COMPLAINT *First* with Jury Demand against all defendants, filed by Gina Fiore. No changes to parties.
07/1/2008	12	RESPONSE to 9 First MOTION to Dismiss for Lack of Jurisdiction *and Improper Venue*, filed by Plaintiff Gina Fiore. *And Plaintiff Keith Gipson.*
08/01/2008	13	MOTION to Dismiss for Lack of Jurisdiction *the First Amended Complaint* by Defendant Anthony Walden.

08/01/2008	14	MEMORANDUM filed by Defendant Anthony Walden re 13 MOTION to Dismiss for Lack of Jurisdiction *the First Amended Complaint*. (Attachments: # 1 Declaration in Support of Motion to Dismiss First Amended Complaint)
08/19/2008	15	RESPONSE to 13 MOTION to Dismiss for Lack of Jurisdiction *the First Amended Complaint*, filed by Plaintiffs Gina Fiore, Keith Gipson. Replies due by 9/2/2008. (Attachments: # 1 Exhibit 1-Decision in Ibrihim v. DHS (9th Cir.))
08/21/2008	16	Unopposed MOTION to Stay *Fed. R. Civ. P. 26(f) Discovery Conference Pending Decision of Defendant Walden's Motion to Dismiss* by Defendant Anthony Walden.
08/25/2008	17	ORDER granting 16 Motion to Stay. Signed by Judge Edward C. Reed, Jr.
08/28/2008	18	REPLY to Response to 13 MOTION to Dismiss for Lack of Jurisdiction *the First Amended Complaint*; filed by Defendant Anthony Walden.
* * *		

09/26/2008	20	Supplemental BRIEF *Submitted in Support of Defendant Michael Anthony Walden's Motion to Dismiss;* filed by Defendant Anthony Walden.
09/26/2008	21	Oral BRIEF filed by Plaintiffs Gina Fiore, Keith Gipson. *per Court's request concerning 28 U.S.C. 1631.*
10/01/2008	22	BRIEF re 21; *Supplemental Reply Brief Submitted Pursuant to this Court's Order of September 11, 2008 (Dkt. #19) in Response to Plaintiffs' Brief (Dkt. #21) and in Support of Defendant Michael Anthony Walden's Motion to Dismiss;* filed by Defendant Anthony Walden.
10/17/2008	23	ORDER denying 9 Motion to Dismiss for Lack of Jurisdiction.; granting 13 Motion to Dismiss for Lack of Jurisdiction. Signed by Judge Edward C. Reed, Jr.
10/21/2008	24	JUDGMENT in favor of Anthony Walden and Unknown Agents of the Federal Government against Gina Fiore, Keith Gipson. Signed by Lance S. Wilson.

11/07/2008	25	NOTICE OF APPEAL as to 23 Order on Motion to Dismiss/Lack of Jurisdiction, 24 Judgment by Plaintiffs Gina Fiore, Keith Gipson.
11/07/2008	26	AMENDED NOTICE OF APPEAL as to 25 Notice of Appeal by Plaintiffs Gina Fiore, Keith Gipson *Clarifying that the final judgment as well as the order are being appealed.*
* * *		

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-17558

GINA FIORE AND KEITH GIPSON

v.

ANTHONY WALDEN AND UNKNOWN AGENTS OF THE FEDERAL GOVERNMENT

RELEVANT DOCKET ENTRIES

Date	#	Document
11/21/2008	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
* * *		
02/19/2009	8	Submitted (ECF) Opening brief for review. Submitted by Appellants Gina Fiore and Keith Gipson.
02/23/2009	9	Filed Appellants Gina Fiore and Keith Gipson excerpts of record in 1 volumes.
02/26/2009	–	Filed Opening Brief [8] filed by Gina Fiore and Keith Gipson in 08-17558.

* * *		
04/07/2009	12	Submitted (ECF) Answering brief for review. Submitted by Appellee Anthony Walden.
04/08/2009	–	Filed clerk order: Answering Brief [12] filed by Anthony Walden in 08-17558.
* * *		
05/07/2009	15	Submitted (ECF) Reply brief for review. Submitted by Appellants Gina Fiore and Keith Gipson.
05/08/2009	–	Filed clerk order: Reply Brief [15] filed by Gina Fiore and Keith Gipson in 08-17558.
* * *		
02/12/2010	21	ARGUED AND SUBMITTED TO ALFRED T. GOODWIN, MARSHA S. BERZON and SANDRA S. IKUTA.
09/12/2011	22	FILED OPINION (ALFRED T. GOODWIN, MARSHA S. BERZON and SANDRA S. IKUTA) REVERSED AND REMANDED. Judge: MSB Authoring, Judge: SSI Dissenting. FILED AND ENTERED JUDGMENT.
* * *		

11/25/2011	28	Filed (ECF) Appellee Anthony Walden Motion to extend time to file petition for rehearing until 12/05/2011 at 11:59 pm.
11/28/2011	29	Filed order (ALFRED T. GOODWIN, MARSHA S. BERZON and SANDRA S. IKUTA) Appellee's November 25, 2011 motion for an extension of time within which to file a petition for rehearing and/or a petition for rehearing en banc is GRANTED. The petition for rehearing shall be filed no later than December 5, 2011.
12/05/2011	30	Filed (ECF) notice of appearance of Jeffrey S. Bucholtz for Appellee Anthony Walden.
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12/05/2011	32	Added attorney Jeffrey S. Bucholtz for Anthony Walden, in case 08-17558.
* * *		
12/05/2011	34	Filed (ECF) Appellee Anthony Walden petition for panel rehearing and petition for rehearing en banc (from 09/12/2011 opinion).

12/06/2011	35	Filed (ECF) Appellee Anthony Walden Correspondence: Notice of Attorney Withdrawal.
12/06/2011	36	Terminated Kelsi Brown Corkran for Anthony Walden in 08-17558, Barbara L. Herwig for Anthony Walden in 08-17558, Brant S. Levine for Anthony Walden in 08-17558.
12/08/2011	37	Filed order (ALFRED T. GOODWIN, MARSHA S. BERZON and SANDRA S. IKUTA) Plaintiff-Appellants are hereby directed to file a response to Defendant-Appellees' Petition for Rehearing and Petition for Rehearing En Banc within 21 days. The response shall not exceed 15 pages.
* * *		
12/28/2011	39	Filed order (MARSHA S. BERZON) Plaintiff-Appellants' unopposed motion for an extension of time is GRANTED. Plaintiff-Appellants' response to Defendant-Appellees' petition for rehearing and petition for rehearing en banc shall be filed no later than January 12, 2012.

01/12/2012	40	Filed (ECF) Appellants Gina Fiore and Keith Gipson response to Combo PFR Panel and En Banc (ECF Filing), for panel and en banc rehearing.
* * *		
08/08/2012	45	Filed order and amended opinion (ALFRED T. GOODWIN, MARSHA S. BERZON and SANDRA S. IKUTA).(Dissent to Order by Judge O'Scannlain; Dissent to Order by Judge McKeown; Opinion by Judge Berzon; Dissent by Judge Ikuta) Amending Disposition Opinion REVERSED AND REMANDED. The opinion, filed on September 12, 2011, is withdrawn and replaced by the amended opinion attached to this order. With this amendment, the majority of the panel has voted to deny appellee's petition for rehearing. Judge Berzon has voted to deny the petition for rehearing en banc and Judge Goodwin so recommends. Judge Ikuta has voted to grant the petition for rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The

		majority of the active judges have voted to deny rehearing the matter en banc. Fed. R. App. P. 35(f). The petition for rehearing and the petition for rehearing en banc are DENIED. Judge O'Scannlain's and Judge McKeown's dissents from denial of en banc rehearing are filed concurrently herewith.
08/10/2012	46	Filed (ECF) Appellee Anthony Walden Motion to stay the mandate.
08/10/2012	47	Filed order (ALFRED T. GOODWIN, MARSHA S. BERZON and SANDRA S. IKUTA) Defendant-Appellee's motion to stay issuance of the mandate pending the filing of a petition for certiorari with the Supreme Court is GRANTED.
11/19/2012	48	Received notice from the Supreme Court: petition for certiorari filed on 11/06/2012. Supreme Court Number 12-574.
* * *		

[DKT. NO. 11, JULY 18, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Gina Fiore and Keith Gipson, Plaintiffs, vs. Anthony Walden and three unknown agents/attorneys with the United States Drug Enforcement Agency, Defendants.	Case No: 2:07-CV-01674-ECR-LRL

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Now come plaintiffs, and for their complaint against defendants, state as follows:

ALLEGATIONS COMMON TO ALL COUNTS AND SUPPORTING JURISDICTION

1. Jurisdiction in this action is based upon 28 U.S.C. 1331 and 28 U.S.C. 1356.

2. Plaintiff, Gina Fiore ("Fiore") and plaintiff, Keith Gipson ("Gipson") are each residents of the State of Nevada.

3. At all times relevant hereto, Defendant, Anthony Walden ("Walden") was an agent with

the United States Drug Enforcement agency and on information and belief, a resident of the State of Georgia. Walden's actions in this matter were taken under the color of authority derived from this status.

4. Defendants, unknown agents and attorneys (defendants A, B, and C, respectively), are each employed by the United States Drug Enforcement Agency.

5. Defendant A worked with Walden at the Hartsfield-Jackson Atlanta International Airport ("Airport"), in Atlanta, Georgia.

6. Defendant B also worked at Airport and is a dog handler.

7. Defendant C is an attorney or other person employed in Quantico, Virginia, and who prepared the 'probable cause' affidavit supporting the forfeiture of the funds owned by plaintiffs as described below.

8. Plaintiffs are professional gamblers working in an area commonly referred to in the industry as "advantage gambling." That is, they limit their play to legal games where they hold a statistical edge over the casino or other competitors (such as in a poker tournament).

9. In July and early August of 2006, plaintiffs undertook a gambling excursion requiring travel.

10. Amongst advantage gamblers travel is common in order to avoid being barred by casinos that recognize their skill and winning propensities.

I.e., it is beneficial in the trade to gamble where you will not be recognized.

11. Plaintiffs trip began in Las Vegas (where each plaintiff maintained a residence), then went to Atlantic City, New Jersey, and culminated in San Juan, Puerto Rico before a return to Las Vegas.

12. Due to the nature of casino gambling and the variances in winning, such trips, as was plaintiffs' trip, begin with a "traveling bank." That is, the plaintiffs started their trip with tens of thousands of dollars in U.S. currency. (Something greater than $30,000.00). This currency was to travel with plaintiffs and the remainder plus any profit was to return to Las Vegas with the plaintiff, and other than the incidental transit and like/kind exchanges the funds were readily identifiable originating and returning to Las Vegas as the ordinary static place where they were situated as plaintiffs' bank for gambling.

13. By the time they began their return trip the plaintiffs had accumulated substantial winnings, and on August 8, 2006 they departed San Juan for return to Las Vegas with approximately $97,000.00 in U.S. currency between them.

14. Neither plaintiff participates in use of illicit drugs.

15. Neither plaintiff participates in the sale of illicit drugs.

16. Neither plaintiff has any record in any database indicating any history with illicit drugs or otherwise indicating that the funds carried by them were in any way tainted.

17. On arriving at the airport in San Juan, Gipson carried $62,904.00 and Fiore carried $34,023.00. All but approximately $15,000.00 of Gipson's funds were in a carry-on bag with the balance being in pockets. Functionally all of Fiore's funds, save for pin money, were in her carry-on bag.

18. Upon entering the terminal, an agricultural x-ray inspection was undertaken of Fiore and Gipson's baggage. Nothing untoward was noted.

19. Gipson and Fiore proceeded to check two large bags that passed further screening, and obtain seat assignments.

20. Gipson and Fiore proceeded to the TSA checkpoint.

21. At the TSA checkpoint, Gipson and Fiore were put through the heightened security procedures. This was normal as they were traveling on one-way tickets.

22. Both Fiore and Gipson passed through the sniffer device (on information and belief, an IONSCAN® SENTINEL II Contraband Detection Portal) without incident or indication of any problem or contraband.

23. In passing through the IONSCAN® SENTINEL II Contraband Detection Portal, both plaintiffs were screened for even minute traces of cocaine,

heroin, PCP, THC, methamphetamine, marijuana, and ecstasy, and none were indicated.

24. The heightened security procedures also required that the bags of Fiore and Gipson be searched.

25. Gipson's bag was searched, and it was noted that he had a large amount of cash.

26. The TSA agent asked Gipson how much cash was in the bag, and Gipson answered truthfully approximating $50,000.00. Gipson also had approximately $15,000.00 on his person which had also passed the IONSCAN test.

27. The TSA agent then passed Gipson through.

28. Fiore also had her bag searched, and the TSA agent addressing Fiore noted that she had a large amount of cash and asked how much was there.

29. Fiore responded truthfully stating that approximately $30,000.00 was in her carry-on bag.

30. Upon spotting the cash, the TSA agent detained Fiore and consulted with a person appearing to be a supervisor. It is believed that this person was named Omar.

31. The supervisor then took over the detention informing Fiore that she had to wait while TSA contacted someone else.

32. DEA agent Michael Cuento and two other agents arrived and questioned Fiore. They did

inform her that she was free to leave and did not have to answer any questions.

33. Gipson remained proximate and participated loosely in the conversations, but the inquiries by Cuento were directed to Fiore.

34. Fiore cooperated and answered the questions directed at her by Cuento. No direct questions were asked of Gipson, but he did provide some input and was part of the conversations.

35. Cuento was told by Fiore that plaintiffs had departed earlier that day from the casino property in San Juan known as the El San Juan and that they had been gambling.

36. Both Fiore and Gipson provided valid California driver's licenses to Cuento.

37. Both Fiore and Gipson also volunteered that they had residences in Las Vegas (now their permanent residences) and California, truthfully provided Cuento with the additional information concerning their Las Vegas residences, and truthfully indicated that Las Vegas was the final destination of most if not all of the funds in their possession, the originating destination for a substantial part of the currency in their possession, and that they were returning to their residences in Las Vegas.

38. Cuento asked if the El San Juan would verify her statement and Fiore explained in response that security at the El San Juan would not know her by name (she had played and stayed anonymously), but would recognize her picture.

39. Cuento escorted Fiore and Gipson to their plane, and on parting stated that they should not be surprised if there was further questioning in Las Vegas.

40. On information and belief, after departure from San Juan, TSA or the DEA conducted background checks on plaintiffs through at least one government database, and the background checks were returned with no negative indications.

41. As Fiore and Gipson got on the plane, they noticed that Cuento and the other agents had followed plaintiffs to their departing plane and were talking to the Delta personnel at the gate. The content of this conversation is unknown.

42. Fiore and Gipson, taking Cuento at his word, made arrangements by telephone to be met in Las Vegas by their attorneys.

43. Fiore and Gipson landed in Atlanta for their connection to Las Vegas.

44. While at the Atlanta airport, Fiore purchased a tea at a Starbucks and Gipson visited the men's room. Neither plaintiff left the transit area proximate to their departure gate and neither plaintiff entered the general area of Atlanta unconnected with their immediate connection.

45. They then proceeded to their gate for Las Vegas departure.

46. At the gate Fiore was approached by defendant, Walden, and another DEA agent. defendant A.

47. Over the ensuing 10+ minutes, she was questioned by Walden and defendant A and cooperated.

48. She answered the following truthfully:

    a. She did not have contraband;

    b. She was not carrying weapons;

    c. She was not carrying drugs;

    d. She is a gambler by trade;

    e. The money in their possession was her gambling bank and winnings;

49. Fiore also explained that she and Gipson were professional advantage gamblers.

50. Fiore showed a trip record for her trip dating back to July 10, 2006, together with casino indications and gaming results. Such logs are kept by professional gamblers as support for tax purposes, and are regularly compiled in the trade.

51. Gipson was also sequestered from Ms. Fiore and asked some questions including what he could show to demonstrate that his trip was for gaming as had been indicated.

52. Gipson truthfully responded that he had numerous receipts that were in his checked baggage.

53. Gipson also answered a number of other questions similar to those posed to Fiore, and answered them truthfully.

54. After 10+ minutes, Fiore was told by Walden that the dogs would be brought up.

55. A dog and handler arrived and was taken to Fiore's and Gipson's respective bags in a purported test (there were no control bags present, and the currency was already determined clean from the IONSCAN device referenced above).

56. When the dog arrived an alleged test, cursory at best, was undertaken with respect to the carry-on baggage of Gipson and Fiore.

57. On information and belief, the results of the test were, at best, inconclusive of the presence of any contraband on Gipson's bag (the dog had pawed Gipson's bag one time only and otherwise presented no reaction to the bags), and the handler and Walden affirmatively indicated that the test on Fiore's bag was negative.

58. Despite the fact that the dog had given no indication whatsoever of any interest in Fiore's bag and despite the fact that both the handler and Walden had stated that there was only a negative result with respect to Fiore's bag, Gipson and Fiore were then informed that the dog had allegedly alerted to their bags and their money would be seized.

59. The dog handler, defendant B, falsified conclusions that the dog had alerted to both bags and falsified a conclusion that the dog he handled had indicated the presence of contraband related to the cash at a level to support a conclusion that the cash was involved

in drug transactions rather than normal circulation.

60. Walden with the support of defendants A and B then took possession of plaintiffs' funds, including the pin money of Fiore.

61. Fiore requested that of the $97,000 or so in funds seized whether the agent could at least leave her and Gipson cab fair for Las Vegas, which request was refused.

62. Walden and defendant A then told plaintiffs in no uncertain terms that if they later produced legal receipts demonstrating the legitimacy of the funds, the funds would be returned.

63. The search of plaintiffs' bags in Atlanta also disclosed that plaintiffs were carrying certain books including Beyond Counting by James Grosjean and Sklarsky (phoenetic) poker books in accord with their profession as gamblers.

64. Fiore also produced a receipt for the rental of a Hyundai Brio in Puerto Rico.

65. Immediately prior to boarding their connection Walden seized the funds being carried by Fiore ($34,023.00) and Gipson ($62,904.00). In fact the demand and the seizure occurred after the plaintiffs' connecting flight to Las Vegas had been substantially boarded.

66. Sometime after plaintiffs and their checked baggage passed screening in San Juan and they were determined to be carrying the currency referenced, plaintiffs' checked bags were seized and searched. Indications are that these bags

were seized and searched by DEA agents, and not TSA agents, as characteristic TSA stickers that accompany a TSA search of checked luggage were absent.

67. Plaintiffs' checked luggage also did not make its connection to Las Vegas, and was apparently seized in Atlanta for the search. Thus, it appears that the search was conducted by, or at the direction of, the DEA with the participation of Walden. The movement of items inside the baggage indicated that the search of the checked luggage was thorough.

68. The search of the checked baggage substantiated the plaintiffs' information that had been provided in San Juan and in Atlanta.

69. The search and withholding of the checked baggage of the plaintiffs was without probable cause, unreasonable, and also constituted an illegal search and seizure by the defendants.

70. Upon returning to their homes in Las Vegas, plaintiffs marshaled records within Las Vegas to comply with defendant's request and representation set forth in ¶ 62, above. On August 30, 2006, plaintiffs forwarded the following to Walden from Las Vegas:

    i. Copies of federal tax returns showing that each plaintiff made their living through gaming;

    ii. Receipts for their trip;

    iii. Travel itinerary for the trip; and

iv. Hotel records showing that they gambled at such a high level that the casinos would provide them rooms on a complimentary (free) basis;

Additionally, it was explained to Walden that Gipson had played under a legal alias commonly used by him in gaming.

71. On September 15, 2006, further information that had been secured by Gipson was forwarded to Walden. This information was a win record on El San Juan letterhead demonstrating that Gipson had left the hotel with over $30,000.00 won during his stay there, and that this departure was immediately preceding the seizure of the money by Walden, Defendant A, and Defendant B.

72. Walden necessarily recognized that in addition to a "bank" held by Gipson for his seed money in gaming and necessarily originating in Nevada, the seized funds included at least $30,000.00 in cash received from legal gaming win in Puerto Rico.

73. In accord with Walden's representation, upon demonstrating that the funds were held through gaming pursuits, Gipson and Fiore again requested that the funds be returned.

74. Walden necessarily recognized that the seized funds were not related to any illicit drug trade and were not contraband or the proceeds of contraband. All defendants recognized at all times that the destination of the funds at the time of the seizure was Las Vegas, Nevada, and

that a substantial amount of the currency had also originated at Las Vegas, Nevada.

75. The funds were not returned, and Walden's seizure continued.

76. The matter was then forwarded to DEA offices in Virginia.

77. In reviewing the matter the DEA officials in Virginia necessarily reached the conclusion that the funds were not related to any illicit drug trade.

78. Further, on information and belief, either in Georgia or Virginia, the seized funds were subjected to further tests disclosing that they were nothing more than ordinarily circulated currency.

79. Further, on information and belief, either Walden or Defendant C, with Walden's acquiessance and encouragement, searched data bases for background on plaintiffs including data bases compiled and maintained in Nevada. These searches indicated that the plaintiffs were 'squeaky clean.'

80. Despite the knowledge that the funds were not related to any illicit drug trade or otherwise subject to forfeiture, defendant C and Walden, and on information and belief, defendant A, worked together to provide a false probable cause affidavit, known by each to be false, for forwarding to the U.S. attorney in Georgia to prosecute a forfeiture action.

81. The intentionally false and inappropriate statements within the probable cause affidavit included the following:

    i. That Gipson had been uncooperative (Gipson had been fully cooperative);

    ii. That Gipson and Fiore provided answers inconsistent with each other (their answers given in response to questions were true and consistent);

    iii. That Gipson had refused to respond to questioning (Gipson cooperated with all questioning); and

    iv. That there was sufficient evidence to provide probable cause to forfeit the funds at issue as drug proceeds.

82. Not only are all four conclusions false and known to be false, the third conclusion in appearing in a probable cause affidavit is patently improper as the assertion of a constitutional right can never be used to imply or infer guilt, and this fact would be known by any reasonable police agent.

83. Walden and defendant C also intentionally and willfully left out from their probable cause affidavit much, if not all, of the exculpatory evidence they had discovered or knew before referring the matter to the attorney for prosecution of the forfeiture, thusly preparing a false and misleading probable cause affidavit by omitting the following known to them:

a. Plaintiffs had no history of illicit drug use or trade;

b. Plaintiffs had a demonstrable history as advantage gamblers;

c. Plaintiffs bags had passed through an agricultural inspection and plaintiffs had passed through an IONSCAN inspection without any indication of the presence of drugs;

d. Plaintiffs had provided actual receipts for much of the funds at issue;

e. No less than $30,000.00 of the funds held by Gipson could be directly traced to a legal source proximate to their seizure.

84. At the time that the probable cause affidavit was drafted, Walden and defendant C recognized that the funds were not subject to forfeiture and that they had authority and duty to return or cause the return of the seized the funds to plaintiffs in Las Vegas and any police agent acting reasonably would have so concluded and returned the money. Nevertheless, they continued the seizure of the funds.

85. At the time that the probable cause affidavit was drafted, any reasonable officer acting in like or similar circumstances would have returned the seized funds to the plaintiffs in Las Vegas.

86. There were innumerable indicators of lack of a crime connected with the seized funds (as regularly cited under the law to prove the

obverse) that were suppressed by the defendants, including:

i. The separated plaintiffs provided consistent renditions of fact;

ii. At the scene the plaintiffs presented a reasonable legal explanation for possession of the funds at issue;

iii. The plaintiffs passed through the IONSCAN® SENTINEL II Contraband Detection Portal without any indication of contraband;

iv. Plaintiffs carry-on bags passed through an agricultural inspection without any indication of contraband;

v. The plaintiffs had clean records with no history of drug interaction;

vi. The plaintiffs addressed the defendants directly and truthfully at all times;

vii. The plaintiffs cooperated in questioning without evasion;

viii. The plaintiffs provided follow-up information from independent sources confirming the truth of their representations, as well as providing tax returns and receipts showing the innocent source of the funds;

ix. The plaintiffs' cash was carried openly and without secreting;

x. The cash was not secured in any way so as to prevent "sniffing" activities (i.e., it was not wrapped in aluminum foil, it was not covered in tape, and it was not secreted in hidden compartments); and

xi. The additional verifiable information provided and known to Walden and defendant C that Gipson had a history as a professional gambler such that his activities and achievements in the field had been published and Fiore had a history as an advantage gambler in historically suing a casino that had persecuted her for such activities.

xii. The fact that a thorough search of plaintiffs' checked baggage failed to disclose any contraband or indication that plaintiffs participated in drug related activities, and also affirmatively showed that plaintiffs disclosed itinerary was truthful.

87. Walden and defendant C necessarily objectively and subjectively realized and recognized that the funds seized from the plaintiffs were not drug proceeds and were not subject to forfeiture. Nevertheless, despite demand, despite knowledge of innocence, and despite the duty to return the funds, the funds were not returned to Las Vegas as required and the matter was referred to the Office of the United States

Attorney for prosecution on the falsified and willfully deficient information.

88. In fact, either defendant C or Walden affirmatively represented to the AUSA that there appeared to be no basis to prosecute the currency under as originating from the drug trade, but sought to continue the prosecution on the basis that the plaintiffs used strategies of which they personally disapproved in gambling.

89. Despite the recognition in the preceding paragraph, Walden and defendant C forwarded the matter to the United States Attorney Dahil Goss in Atlanta for prosecution of a forfeiture action against the funds.

90. The AUSA drawing the case, Ms. Dahil Goss ("Goss") noticed disparities in the facts supporting probable cause, and conducted a cursory investigation of the matter concluding immediately that questions remained such that there was an insufficient basis to go forward with the forfeiture action, and she independently contacted plaintiffs through counsel to hear the other side of the story.

91. Upon contacting the plaintiffs, Goss discovered that certain information appeared to be missing from the referral to her by Walden and defendant C, and informed plaintiffs that she would look further into the matter and thoroughly review the file.

92. Upon looking into the matter and discovering further information that had been omitted from the referral by Walden and defendant C and the

apparent misrepresentations in the probable cause affidavit constructed by Walden and defendant C, Goss concluded that there was no probable cause for the forfeiture, and contacted plaintiffs with an offer to return the funds in exchange for a release.

93. Plaintiffs refused to execute a release.

94. Goss, without a release, but apparently recognizing her duty as an AUSA, directed the United States Drug Enforcement Agency to return plaintiffs' funds to Las Vegas.

95. Plaintiffs' funds were then returned to Las Vegas, Nevada, more than six months following the seizure of the funds by the defendants despite the fact that the defendants had held all the information conclusively demonstrating the legal source of the funds and the lack of probable cause for seizure for over five months.

II. CLEARLY ESTABLISHED LAW

96. The law is clearly established such that any reasonable police officer would recognize that seizure of funds forfeiture requires probable cause at the time of the seizure that the funds are subject to forfeiture under the law. *See e.g. United States v. Baro*, 15 F.3d 563, 567 (6th Cir. 1994), *reh. denied United States v. Baro*, 1994 U.S. App. LEXIS 5951 (6th Cir. 1994), *cert denied Barro v. United States*, 513 U.S. 912 (1994) ("Absent valid consent, the government must establish that this warrantless seizure was justified by probable cause. *See United States v.*

Place, 462 U.S. 696, 701, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983). "Recognizing that a greater expectation of privacy exists in property carried on one's person, this Court has stressed that "probable cause is required to justify the seizure of such items." *In re* $53,082.00, 985 F.2d at 249. In this context, probable cause means a reasonable ground for belief that the item seized is contraband or evidence of a crime. *See Place*, 462 U.S. at 701; *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989).").

97. The law is clearly established that the presence on a person of a large amount of United States currency, without more, is insufficient by itself to form probable cause for seizure of the funds. *Id., and see United States v. United States Currency in the Sum of One Hundred Eighty-Five Thousand Dollars*, 455 F. Supp. 2d 145, 154 (D.N.Y. 2006).

98. The law is clearly established that the presence on a person of a large amount of United States currency and an alert by a drug detecting dog, without more, is insufficient to form probable cause for the seizure of the funds. *See United States v. United States Currency, $30,060.00*, 39 F.3d 1039, 1042 (9th Cir. 1994).

99. The law is clearly established that police must take into account known exculpatory facts in evaluating probable cause determinations. *See Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003) ("An officer is not entitled to a qualified immunity defense, however, where exculpatory

evidence is ignored that would negate a finding of probable cause."), *Wilson v. Morgan*, 477 F.3d 326, 334 (6th Cir. 2007), *Kingsland v. City of Miami*, 382 F.3d 1220, 1228 (11th Cir. 2004).

100. The law is clearly established that once it is known that funds should be returned due to a lack of basis for prosecution of the funds in a forfeiture action, the continued holding of the funds is a violation of the constitutional proscription on seizures without due process. *See e.g., Ibarra v. Barrett*, 2007 U.S. Dist. LEXIS 29143 (D. Tenn. 2007).

101. The law is clearly established that falsifying evidence on an affidavit in support of a seizure or a search renders the seizure or search unconstitutional.

102. It is clearly established law that any reasonable police officer would recognize the defendants undertook the following actions in violation of the Fourth Amendment of the United States Constitution:

    i. In initially seizing the funds at issue despite a lack of probable cause that would have been recognized by a reasonable officer in the employ of the United States;

    ii. In retaining the funds despite an ability to return after actually reaching a conclusion that plaintiffs' funds were not the result of any drug related activity;

iii. In drafting and forwarding for prosecution a probable cause affidavit for the continued seizure of plaintiffs' funds while knowing that the affidavit contained false statements of fact to support the continued retention, and without such false statements would have indicated a clear lack of probable cause; and

iv. In willfully seeking to prosecute the funds while withholding exculpatory information known to them.

v. In willfully and intentionally withholding the scope of the exculpatory information to the Assistant United States Attorney to whom the defendants forwarded the matter for prosecution.

III. BALANCE OF CLAIM

103. The probable cause affidavit drafted by the defendants in support of the prosecution of the plaintiff's funds was forwarded on to an Assistant United States Attorney.

104. The information provided to the AUSA was so obviously slanted and unobjective as to require the AUSA to conduct a follow-up with the defendants to fill in the holes in the presentation and request information that had been excluded from the case as forwarded.

105. Upon review of the matter by the AUSA following provision of the secreted documents and information by the defendants, reached the inescapable conclusion patently obvious to any reasonable police officer that the funds were seized without probable cause and there was no basis to go forward with the prosecution.

106. The AUSA contacted the plaintiffs and informed the plaintiffs that she had concluded that the funds should be returned.

107. On plaintiffs' refusal to execute a release requested by the AUSA, the funds were returned without restriction on or about March 1, 2007.

108. At all times all defendants recognized that their actions amounted to little more than attempted theft by them of plaintiffs' funds.

109. Walden, despite repeated demands and while fully recognizing the legitimacy of the funds, refused to return the funds to the plaintiffs.

110. Defendants' actions constitute a violation of U.S. Const. Amd. IV in the unreasonable seizure and unreasonable continued seizure of the plaintiff's funds.

111. Plaintiffs suffered damages in paying counsel to work on recouping the funds during the period of their unconstitutional seizure. These payments were made in Las Vegas, Nevada.

112. Plaintiffs suffered damages in lost use of the funds unconstitutionally seized during the period of seizure.

113. Plaintiffs suffered damages in the emotional distress foisted upon them by the unconstitutional seizure proximate to their persons and in their forced abandonment without ready means of transport in Las Vegas due to the unconstitutional seizure of the funds.

114. Defendants' actions violated each of the clearly established principles of law set forth above.

Wherefore Plaintiffs pray that they be awarded judgment in an amount deemed just and proper by the trier of fact, together therewith be awarded attorney's fees and the costs of this litigation.

* * *

JURY DEMAND

Plaintiffs herewith request a trial by jury of all claims and contentions so triable under the above complaint.

DATED this 18th day of July, 2008.

Nersesian & Sankiewicz

/s/

Attorney for [Plaintiffs]

[DKT. NO. 13, AUG. 1, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Gina Fiore and Keith Gipson, Plaintiffs, vs. Anthony Walden and three unknown agents/attorneys with the United States Drug Enforcement Administration Defendants.	)	Case No: 2:07-CV-01674-ECR-LRL

MOTION TO DISMISS
FIRST AMENDED COMPLAINT

PLEASE TAKE NOTICE that Defendant Michael Anthony Walden moves to dismiss the above-captioned amended complaint. Defendant Walden previously moved to dismiss Plaintiffs' original complaint, however that motion was mooted by Plaintiffs' subsequent amendment and filing of the First Amended Complaint. Defendant Walden now moves for dismissal of the First Amended Complaint, which is the operative complaint in this litigation at this time.

The grounds for the motion are: (1) this Court lacks personal jurisdiction over Defendant Walden

and (2) the United States District Court for the District of Nevada is the improper venue for this case.

Pursuant to Rule 7-2(a) of the Local Rules of Practice of the United States District Court for District of Nevada, Defendant Walden has submitted the accompanying memorandum of points and authorities in support of this motion. Defendant Walden has also submitted a signed declaration in support of this motion.

DATED: August 1, 2008

Respectfully submitted,

/s/

Attorneys for Defendant Michael Anthony Walden

* * *

[DKT. NO. 14-2, AUG. 1, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Gina Fiore and Keith Gipson, Plaintiffs, vs. Anthony Walden and three unknown agents/attorneys with the United States Drug Enforcement Administration Defendants.	)	Case No: 2:07-CV-01674-ECR-LRL

DECLARATION OF ANTHONY WALDEN

I, Michael Anthony Walden, declare as follows:

1. Pursuant to 28 U.S.C. § 1746, I make this declaration based on personal knowledge and belief and to the best of my recollection. If called as a witness at trial, I would testify to the statements made herein.

2. On or about August 8, 2006, I held the position of a deputized federal Narcotics Investigator assigned as a Task Force Officer to the Atlanta Division of Drug Enforcement Administration's ("DEA") "Task Force Group 1" at the Atlanta Hartsfield-Jackson ("Atlanta") Airport. I was employed as a Task Force Officer with the DEA's

Task Force Group 1 from August 23, 2002 continuously through November 16, 2006.

3. I presently am a Master Patrol Officer for the City of Covington, Georgia, Police Department. I have been a Master Patrol Officer for the Covington City Police Department since July 6, 2003. Prior to my position as Master Patrol Officer, I was a Patrol Officer for the Covington City Police Department for approximately five years, beginning in July 1998.

4. While deputized as a DEA Task Force Officer from August 2002 until November 2006, I was assigned continuously to the Atlanta Airport in the State of Georgia.

5. As a deputized DEA Task Force Officer, I performed federal law enforcement functions as part of a DEA investigative group. Members of the task force operated under the supervision and control of a DEA Group Supervisor in support of DEA's domestic airport interdiction program, which is intended to deter the use of domestic airport facilities for the movement of illegal drugs, effectuate seizures of illegal drugs and drug proceeds, and effectively prosecute individuals involved in the transportation of illegal drugs and drug proceeds.

6. My duties as a task force officer included engaging in consensual encounters with passengers and other persons using the airport facilities, conducting investigative stops where warranted, and performing duly-authorized searches, seizures, and arrests. As a DEA Task Force Officer assigned to an airport group, I therefore interacted with thousands of travelers who were passing through the Atlanta

Airport. Those persons were primarily domestic travelers from nearly all fifty states as well as some international travelers from foreign countries around the world.

7. I am currently a resident of the State of Georgia. During the alleged events giving rise to this litigation, I was a resident of the State of Georgia.

8. I have never lived or resided in the State of Nevada.

9. I have never physically been present in the State of Nevada.

10. I do not now nor have I ever owned any property or businesses in the State of Nevada.

11. I have never conducted any personal business in the State of Nevada.

12. I have only conducted official business involving contact with the State of Nevada on one occasion. While working as a Task Force Agent for DEA at the Atlanta Airport, I contacted the Nevada Gaming Commission to verify a traveler's claim that seized money was won in the Nevada Lottery. This investigation occurred approximately one to two years before the alleged events giving rise to the instant litigation, and that investigation was in no way related to the alleged events giving rise to this litigation.

13. On or about August 28, 2006, Task Force Group 1 was advised by a law enforcement official at the San Juan, Puerto Rico Airport that Plaintiffs had boarded a plane for the Atlanta Airport and were stopping at the Atlanta Airport on their way to their

final destination at McCarran International Airport in Las Vegas, Nevada.

14. While Plaintiffs were at the Atlanta Airport, they were met by members of Task Force Group 1, including myself. All of my interactions with Plaintiffs during our brief encounter occurred solely in the State of Georgia at the Atlanta Airport.

15. While speaking with Plaintiffs during the encounter giving rise to this litigation, I asked Plaintiffs for identification. Plaintiffs provided state-issued driver's licenses, which were not issued by the State of Nevada. After I briefly examined and returned their identification, I turned my attention to how they came to be in possession of approximately $97,000 in cash and if they possessed any documentation to support their explanation.

16. All of my interaction with Plaintiffs and their carry-on baggage occurred in the terminal at the Atlanta Airport in the State of Georgia. I had no interaction with Plaintiffs' checked luggage. Specifically, I did not search nor seize nor encourage anyone else to search or seize Plaintiffs' checked luggage. Nor did I cause Plaintiffs' checked luggage to miss Plaintiffs' connection flight.

17. After the seizure, Task Force Group 1 officers, myself included, immediately transferred the seized cash to a secure location designated to store seized cash. The cash was then processed and stored. Within approximately one hour of the seizure, I was no longer in possession of the seized cash. As a Task Force Agent for DEA who assisted in the seizure, I

did not possess the authority to return the cash to Plaintiffs once it was seized.

18. The following day, I received a communication from Plaintiffs' attorney, Robert A. Nersesian, requesting return of the funds seized during the encounter with Plaintiffs. Mr. Nersesian, on behalf of his clients, transmitted documents and receipts to me purportedly verifying aspects of Plaintiffs' account of events, such as how they obtained the cash in question.

19. I did not contact Mr. Nersesian or anyone else in Nevada regarding Plaintiffs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of July, 2008

/s/

Michael Anthony Walden

[DKT. NO. 24, OCT. 21, 2008]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Gina Fiore, et al

Plaintiffs,

v.

Anthony Walden, et al

Defendants.

Case Number:
2:07-CV-01674-
ECR-LRL

JUDGMENT IN A CIVIL CASE

* * *

[X] **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Judgment is entered in favor of Defendants against Plaintiffs

October 21, 2008

/s/
Clerk

/s/
(By) Deputy Clerk

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 28 2013
OFFICE OF THE CLERK

NO. 12-574

In the
Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State.

2. Whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue under 28 U.S.C. § 1391(b)(2) even if the defendant's alleged acts and omissions all occurred in another district.

PARTIES TO THE PROCEEDING

Petitioner Anthony Walden was the defendant-appellee in the court below. Respondents Gina Fiore and Keith Gipson were plaintiffs-appellants in the court below. In the district court, respondents also asserted claims against "three unknown agents/attorneys with the United States Drug Enforcement [Administration]." Those defendants were never served and thus were not parties, but they were nonetheless listed in the caption in the court of appeals as appellees.

TABLE OF CONTENTS

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 1
Statement 1
Summary of argument 11
Argument 16
I. To be haled into court based on an intentional tort, a defendant must have expressly aimed conduct at the forum state, not merely at a person with known connections to the forum state 16
A. Due process requires conduct expressly aimed at the forum state itself 17
1. An out-of-state defendant must have purposefully directed conduct at the forum state 17
2. In the intentional-tort context, purposeful direction means conduct expressly aimed at the forum state 20
3. The Ninth Circuit ignored the distinction between aiming at the plaintiff and aiming at the forum state 22
B. Basic principles of state judicial authority also support requiring contacts with the forum state itself 31
C. The Ninth Circuit's approach is unfair to defendants 34

II. The place where a plaintiff feels the effects of a tort is not a proper venue under 28 U.S.C. § 1391(b)(2) if the defendant's conduct all occurred elsewhere 41

A. The Ninth Circuit's conclusion that venue was proper has no basis in § 1391(b)(2)'s text 42

1. The place where a plaintiff merely feels the consequences of an alleged tort occurring elsewhere is not a proper venue under § 1391(b)(2) 43

2. The other facts on which the Ninth Circuit relied do not support its venue holding 49

3. Petitioner's conduct is the only relevant factor here 51

B. Congress did not intend venue under § 1391(b)(2) to lie wherever the plaintiff feels effects of a tort 54

Conclusion 59

Statutory Appendix—28 U.S.C. § 1391 ..... 1a

TABLE OF AUTHORITIES

Cases

Albright v. Oliver,
510 U.S. 266 (1994) 9, 50

Asahi Metal Indus. Co. v. Super. Ct. of Cal.,
480 U.S. 102 (1987) 18

Brunette Mach. Works, Ltd. v. Kockum Indus.,
406 U.S. 706 (1972) 44

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) ..... *passim*

Burnham v. Super. Ct. of Cal.,
495 U.S. 604 (1990) 17

Calder v. Jones,
465 U.S. 783 (1984) ..... *passim*

Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.,
529 U.S. 193 (2000) 53

Cottman Transmission Sys., Inc. v. Martino,
36 F.3d 291 (3d Cir. 1994) 48, 55

Daniel v. Am. Bd. of Emergency Med.,
428 F.3d 408 (2d Cir. 2005) 52

Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,
514 F.3d 1063 (10th Cir. 2008) 19, 21, 22, 28

ESAB Grp., Inc. v. Centricut, Inc.,
126 F.3d 617 (4th Cir. 1997) 40

Goodyear Dunlop Tires Operations, S.A. v. Brown,
131 S. Ct. 2846 (2011) 26

Hanson v. Denckla,
357 U.S. 235 (1958) 18, 19, 27, 34

Heck v. Humphrey,
512 U.S. 477 (1994) 51

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 19

Imo Indus. v. Kiekert AG,
155 F.3d 254 (3d Cir. 1998) 24

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 16

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) 11, 17, 18, 24

J. McIntyre Mach., Ltd. v. Nicastro,
131 S. Ct. 2780 (2011) ..... *passim*

Jenkins Brick Co. v. Bremer,
321 F.3d 1366 (11th Cir. 2003) 52, 55

Johnson v. Arden,
614 F.3d 785 (8th Cir. 2010) 21, 28, 39

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) ..... *passim*

Kulko v. Super. Ct. of Cal.,
436 U.S. 84 (1978) 18, 19, 24, 25, 28, 33

Leroy v. Great W. United Corp.,
443 U.S. 173 (1979) 14, 42, 43, 44, 48

McGee v. Int'l Life Ins. Co.,
355 U.S. 220 (1957) 17, 19, 21, 27

Millennium Enters. v. Millennium Music, LP,
33 F. Supp. 2d 907 (D. Or. 1999) 39

Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.,
623 F.3d 440 (7th Cir. 2010) 22, 29, 31, 40

Myers v. Bennett Law Offices,
238 F.3d 1068 (9th Cir. 2001) 8

Pennoyer v. Neff,
95 U.S. 714 (1878) 17

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 33

Richards v. United States,
369 U.S. 1 (1962) 46

Rush v. Savchuk,
444 U.S. 320 (1980) 12, 20, 24, 25, 26

Shaffer v. Heitner,
433 U.S. 186 (1977) 19

Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.,
549 U.S. 422 (2007) 16

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 52

Stafford v. Briggs,
444 U.S. 527 (1980) 37, 57

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 33

Stewart Org., Inc. v. Ricoh Corp.,
487 U.S. 22 (1988) 58

Uffner v. La Reunion Francaise, S.A.,
244 F.3d 38 (1st Cir. 2001) 53

Wallace v. Herron,
778 F.2d 391 (7th Cir. 1985) 24, 27

Woodke v. Dahm,
70 F.3d 983 (8th Cir. 1995) 45, 52, 53

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 26, 32, 34

Young v. New Haven Advocate,
315 F.3d 256 (4th Cir. 2002) 38

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1346(b) 46
28 U.S.C. § 1391(a) (1988) 55
28 U.S.C. § 1391(a)(2) (2006) 55
28 U.S.C. § 1391(b)(2) ..... *passim*
28 U.S.C. § 1391(b)(2) (2006) 55
28 U.S.C. § 1391(e)(1)(C) 57
28 U.S.C. § 1402(b) 57
28 U.S.C. § 1404(a) 58
28 U.S.C. § 2680(k) 53
Federal Courts Jurisdiction and
Venue Clarification Act of 2011,
Pub. L. No. 112-63, 125 Stat. 758 (2011) 55
Nev. Rev. Stat. § 14.065 ..... 5, 16

Regulations

28 C.F.R. § 50.15 37
28 C.F.R. § 50.16 37

Rules

Fed. R. Civ. P. 4(k)(1)(A) 5, 16

Other Authorities

14D Wright, Miller & Cooper,
Federal Practice and Procedure
(3d ed. 2007) 56
H.R. Rep. No. 101-734 (1990),
reprinted in 1990 U.S.C.C.A.N. 6860 55

Merriam Webster's Collegiate Dictionary (10th ed. 1994) 50

Random House Webster's Unabridged Dictionary (2d ed. 1998) 45, 50

Report of the Federal Courts Study Committee (Apr. 2, 1990) 56

Restatement (Second) of Conflict of Laws (1971) 33

Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. Davis L. Rev. 1301 (2012) 36

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a–64a) and the order denying rehearing (Pet. App. 75a–95a) are reported at 688 F.3d 558. The order of the district court granting petitioner's motion to dismiss (Pet. App. 65a–74a) is unreported.

JURISDICTION

The court of appeals issued its opinion on September 12, 2011. Pet. App. 1a. That court amended its opinion and denied rehearing on August 8, 2012. Pet. App. 75a. The petition for a writ of certiorari was timely filed on November 6, 2012, and granted on March 4, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Section 1391(b)(2) of Title 28 of the United States Code, governing venue, provides that "[a] civil action may be brought in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." Section 1391 is reproduced in full in the appendix to this brief.

STATEMENT

Respondents sued petitioner Anthony Walden in Nevada alleging wrongdoing occurring entirely in

Georgia. The Ninth Circuit held that *respondents'* connections to Nevada entitle them to sue petitioner there without violating either the Fourteenth Amendment's limitations on personal jurisdiction or the venue restrictions in 28 U.S.C. § 1391(b)(2).

1. Petitioner is a police officer employed by the City of Covington, Georgia. J.A. 40. Between 2002 and 2006, petitioner was a deputized agent for the Drug Enforcement Administration (DEA) assigned to duty at Atlanta's Hartsfield-Jackson International Airport as part of a federal/state anti-narcotics task force. *Ibid.*

This case arises out of events that took place at the Atlanta airport on August 8, 2006.[1] That day, respondents Gina Fiore and Keith Gipson arrived in Atlanta on a flight from San Juan, Puerto Rico. J.A. 15, 19. Respondents are professional gamblers who had spent time at casinos in San Juan and in Atlantic City, New Jersey, and were flying from San Juan through Atlanta on the way to Las Vegas, Nevada. J.A. 14–15.

Between them, respondents were carrying approximately $97,000 in cash. J.A. 15. Security screeners at a Transportation Security Administration checkpoint in the San Juan airport searched respondents' bags and discovered the money. J.A. 17. Three DEA agents questioned respondents. *Ibid.*

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[1] Because the district court did not hold an evidentiary hearing, respondents' allegations are taken as true for purposes of petitioner's motion to dismiss. See Pet. App. 2a n.2, 68a. Petitioner disputes many of respondents' allegations.

Respondents told the agents that they obtained the cash legally through gambling. J.A. 18. The agents in San Juan allowed respondents to board their flight with the cash and told them that they might face additional questioning later. J.A. 19.

When respondents arrived in Atlanta, they were approached and questioned in the gate area by petitioner and another DEA agent. *Ibid.* Respondents again asserted that the money was obtained from gambling. J.A. 20. They showed petitioner their driver's licenses, which were issued by California. J.A. 18, 42. Respondents allege that they maintain residences in Nevada as well as California. J.A. 18. A third DEA agent arrived with a narcotics-detecting dog. J.A. 21. The dog pawed at Gipson's bag. *Ibid.* The agents informed respondents that the dog's reaction indicated the presence of contraband and seized the cash. *Ibid.* Petitioner told respondents that they could recover the money by producing documentation showing that it was legitimately obtained. J.A. 22.

Respondents then boarded their flight to Las Vegas. *Ibid.* Over the next few weeks, they sent documents to petitioner in an effort to show the legitimacy of the funds. J.A. 23–24. Respondents claim that, despite receiving this information, petitioner assisted in drafting a false affidavit that he submitted to the Office of the United States Attorney for the Northern District of Georgia to attempt to show probable cause for forfeiture of the funds. J.A. 25–30. An Assistant United States Attorney in that District concluded that there was not probable cause for forfeiture. J.A. 30–31. Respondents were never arrested or prosecut-

ed, no forfeiture complaint was filed, and their cash was returned on March 1, 2007. J.A. 35.

2. Respondents filed this *Bivens* suit against petitioner in the United States District Court for the District of Nevada. J.A. 1.[2] After petitioner moved to dismiss, respondents amended their complaint. J.A. 2–3. Respondents' amended complaint alleged that petitioner violated respondents' Fourth Amendment rights by: seizing the cash without probable cause; retaining the cash after receiving proof that it had been obtained legitimately; knowingly preparing a false or misleading probable cause affidavit; and referring the matter for forfeiture based on false or deficient information while withholding exculpatory information. J.A. 23–36; Pet. App. 7a–8a.[3]

Petitioner, represented by the United States Department of Justice, moved to dismiss on both personal-jurisdiction and venue grounds. J.A. 3. In support of his personal-jurisdiction argument, petitioner declared that he has never traveled to Nevada, owned property in Nevada, or conducted any personal business in Nevada; that he never contacted

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[2] Respondents also sued "three unknown [DEA] agents/attorneys." J.A. 14. Those defendants were never served. Pet. App. 7a n.8.

[3] There was disagreement below over whether respondents asserted one claim or multiple distinct claims. Compare Pet. App. 43a–44a (majority opinion) with Pet. App. 54a–56a (Ikuta, J., dissenting). The panel majority read the complaint as containing a distinct claim related to the allegedly false probable cause affidavit. Pet. App. 43a–44a. Petitioner does not challenge that reading here. See Pet. 4 n.2.

anyone in Nevada or directed anyone to take action in Nevada in connection with respondents; that respondents provided him with California, not Nevada, driver's licenses; and that he lacked the authority to return the cash after it was seized. J.A. 41–43. Petitioner also argued that the District of Nevada was not a proper venue under 28 U.S.C. § 1391(b)(2) because the alleged "events and omissions giving rise to" respondents' claims occurred exclusively in Georgia. Dist. Ct. Dkt. No. 14, at 19–23 (Aug. 1, 2008).

The district court granted petitioner's motion to dismiss on personal-jurisdiction grounds. Pet. App. 66a–74a. Because respondents relied on state law for service of process on petitioner, see Fed. R. Civ. P. 4(k)(1)(A), and because Nevada law authorizes personal jurisdiction up to the limits of due process, Nev. Rev. Stat. § 14.065, the district court analyzed whether the Fourteenth Amendment would permit a Nevada court to exercise personal jurisdiction over petitioner. Pet. App. 68a. Respondents conceded that due process required them to allege that petitioner had "purposeful[ly] direct[ed]" his actions toward Nevada. Pet. App. 70a. The district court explained that to make this showing, respondents needed to satisfy what many lower courts call the "effects test" derived from *Calder v. Jones*, 465 U.S. 783 (1984). Under that test, a plaintiff must show (1) that the defendant committed an intentional act (2) that was "expressly aimed" at the forum state and (3) that the defendant knew that harm would be suffered in the forum state. Pet. App. 70a.

The district court concluded that respondents could not satisfy the "express aiming" requirement:

> Walden's intentional act—the search of Plaintiffs' luggage and seizure of their currency—was expressly aimed at Georgia, not Nevada. Walden's search of Plaintiffs' luggage took place in Georgia. Walden's questioning of Plaintiffs took place in Georgia. Walden's seizure of Plaintiffs' currency took place in Georgia. It may be true, as Plaintiffs allege, that Walden's intentional acts committed in Georgia eventually caused harm to Plaintiffs in Nevada, and Walden may have known that Plaintiffs lived in Nevada. But this alone does not confer jurisdiction.

Pet. App. 71a–72a. Because the district court concluded that personal jurisdiction was lacking, it did not address venue. Pet. App. 73a.

3. A divided panel of the Ninth Circuit reversed.

a. In an opinion by Judge Berzon, the majority held that personal jurisdiction over petitioner was proper in Nevada. In the majority's view, the district court had erred by "not consider[ing] the false probable cause affidavit aspect of the case." Pet. App. 17a. The majority reasoned that "'individual targeting' of forum residents—actions taken outside the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections"—was sufficient to establish express aiming. Pet. App. 17a–18a. The requirement was thus satisfied here because the "allegations indicate that at the time the assertedly false affidavit was composed and filed, Walden recognized that the plaintiffs had significant connections to Nevada, particularly with

respect to the funds for which forfeiture was being sought." Pet. App. 22a. Nor did it matter "whether Fiore and Gipson were legal residents of Nevada or whether they simply had a significant connection to the forum," Pet. App. 22a–23a; it was enough that, according to the complaint, petitioner "necessarily recognized, at least by the time he wrote the probable cause affidavit, that the plaintiffs had a connection to Nevada," Pet. App. 24a.

The court of appeals then found the other requirements of due process satisfied. Pet. App. 27a–36a. Accordingly, it held that "the district court erred in concluding that it lacked personal jurisdiction over Walden, at least as to the portion of Fiore and Gipson's complaint pertaining to the false probable cause affidavit and resulting delay in returning the funds." Pet. App. 38a.[4]

Having concluded that the district court had jurisdiction over at least one of respondents' claims, the court of appeals directed the district court to determine whether to exercise "pendent personal jurisdiction" over the remaining claims. Pet. App. 38a–39a. The majority made no secret of its desire that the district court rely on this doctrine (which no party had raised in the appeal) to exercise jurisdiction over the entire case, stating that "the same facts will have

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[4] Notwithstanding its holding that personal jurisdiction could be based on petitioner's conduct that allegedly caused "delay in returning the funds," Pet. App. 28a, the panel majority acknowledged that, as a local police officer deputized as a temporary DEA agent, petitioner had no authority to release the seized funds. Pet. App. 11a n.11.

to be developed with regard to the search and seizure and false affidavit claims" and that this "weigh[ed] strongly in favor of the exercise of pendent personal jurisdiction." Pet. App. 39a.

The court of appeals also held, in response to petitioner's argument that the judgment could be affirmed on the alternative ground that venue was improper, that venue over respondents' suit properly lay in the District of Nevada. Pet. App. 40a–42a. Relying on circuit precedent holding that "the locus of the injury" is a "relevant factor" in determining whether venue is appropriate under 28 U.S.C. § 1391(b)(2), Pet. App. 41a (quoting *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001)), the majority reasoned that venue was proper because respondents "suffered harm in Nevada." *Ibid.* As the court of appeals explained:

> All the economic injuries suffered by Fiore and Gipson were realized in Nevada, including their loss of use and interest on the funds for nearly seven months. . . . Walden fabricated a fraudulent probable cause affidavit to institute forfeiture proceedings against Fiore and Gipson after they had returned to their residences in Nevada, which affected them there; the documentation of the legitimacy of the money was sent from Nevada; and the funds eventually were returned to Fiore and Gipson in Nevada . . . . The arrival of the funds in Nevada was the event that caused Fiore and Gipson's cause of action to mature, because their case was not ripe until the government abandoned the

> forfeiture case against them. See *Albright v. Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J., concurring).

Pet. App. 41a–42a.

Judge Ikuta dissented, arguing that the majority erred in reading the complaint as containing multiple claims; on her reading, "the plaintiffs allege[d] one simple claim: a violation of their Fourth Amendment rights to be free of unreasonable searches and seizures." Pet. App. 54a. Under that reading, personal jurisdiction was lacking because "[t]he complaint does not even hint that Walden learned of plaintiffs' ties to Las Vegas until *after* the seizure was complete." Pet. App. 53a–54a (emphasis in original). The majority's ruling was problematic, Judge Ikuta explained, because it required courts to take jurisdiction over a suit whenever the plaintiffs "assert that the defendant knew their home state and subsequently engaged in some wrongful act." Pet. App. 57a–58a.

b. Represented by present counsel for purposes of seeking further review, petitioner filed a petition for rehearing. J.A. 9–10. The court of appeals denied that petition over eight noted dissenting votes. Pet. App. 76a, 77a, 91a.

Judge O'Scannlain, joined by four other judges, dissented, arguing that the panel's decision "conflict[ed] with cases in other circuits over how to interpret and to apply *Calder*'s express-aiming requirement. The majority of circuits have held that, under *Calder*, a defendant must expressly aim the conduct forming the basis of the claim *at the forum*

state—not just at a known forum resident—before the courts of that state may exercise jurisdiction over the defendant." Pet. App. 84a (emphasis in original).

Judge McKeown also dissented, joined by six other judges. In her view, the panel had, "[w]ith the stroke of a pen," returned the Ninth Circuit "to a discredited era of specific personal jurisdiction, where foreseeability reigns supreme and purposeful direction is irrelevant." Pet. App. 91a. The panel had "broaden[ed] the specific jurisdiction test from one requiring targeted 'express aiming' to one where any attenuated foreign act with foreseeable effects upon a forum resident confers specific jurisdiction." Pet. App. 94a. "If due process limitations on personal jurisdiction are to retain any guiding force," Judge McKeown argued, "purposeful direction may not be collapsed into a diluted version of foreseeability." Pet. App. 95a.

The panel majority added a "post-script" to its opinion to respond to the dissents from denial of rehearing. The majority defended its holding that an intentional act taken with knowledge of the eventual plaintiff's connections to the eventual forum is sufficient: "Walden intentionally targeted persons and funds with substantial connections to Nevada. He thus expressly aimed his conduct at that state, providing a sufficient basis for personal jurisdiction." Pet. App. 47a.

Judge Ikuta also added a post-script to her dissent. Under the panel's opinion, she lamented, "federal officials working in a transportation hub who are sued by disgruntled travelers can now be forced to litigate in any traveler's home state." Pet. App. 63a.

That approach "not only flouts common sense, but also ignores the Supreme Court's recent recognition that personal jurisdiction continues to play a vital role in defending basic fairness and due process." Pet. App. 64a (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786–87 (2011) (plurality opinion)).

4. Petitioner sought a stay of the Ninth Circuit's mandate pending this Court's review, which the court of appeals granted on August 10, 2012. J.A. 12. This Court granted certiorari on March 4, 2013. 133 S. Ct. 1493 (mem.).

SUMMARY OF ARGUMENT

Petitioner's alleged conduct occurred entirely in Georgia, and he has no connections to Nevada. The Ninth Circuit erred by concluding that Nevada possessed personal jurisdiction over petitioner and that the District of Nevada was a proper venue under 28 U.S.C. § 1391(b)(2).

I. In the Ninth Circuit's view, because petitioner "intentionally targeted persons and funds with substantial connections to Nevada," he "thus expressly aimed his conduct at that state, providing a sufficient basis for personal jurisdiction." Pet. App. 47a. That holding is inconsistent with the Fourteenth Amendment's Due Process Clause, which requires that a defendant have contacts with the forum state itself—not merely with a plaintiff who has contacts with the forum state.

A. Since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court has repeatedly stressed the requirement that the defendant have purposefully directed his conduct at the forum in

some way. In the context of intentional torts, *Calder v. Jones* held that this purposeful-direction requirement is satisfied if the defendant "expressly aimed" his conduct at that state, such that the state was the "focal point" both of the tortious conduct and of the harm suffered by the plaintiff. 465 U.S. 783, 789 (1984).

Although the Ninth Circuit purported to follow the express-aiming requirement, the court drained the requirement of all meaning by equating conduct aimed at a *plaintiff* who has known forum-state "connections" with conduct aimed at the forum state itself. See Pet. App. 47a. That holding finds no basis in *Calder*, which stressed numerous facts, beyond the plaintiff's residence, showing that California was the "focal point" of the tort. 465 U.S. at 789–90. And it is inconsistent with this Court's repeated admonition that the plaintiff's contacts with the forum state cannot be "decisive" in determining whether the defendant has the constitutionally required contacts. *E.g.*, *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

Petitioner did not expressly aim his alleged conduct at Nevada. His conduct occurred entirely in Georgia, and he never reached into Nevada, either literally or figuratively. The Ninth Circuit held it sufficient that respondents felt in Nevada the economic effects of the alleged tortious conduct that occurred in Georgia. But a plaintiff will always feel an injury like the loss of the use of seized cash wherever the plaintiff happens to be, which ordinarily will include where the plaintiff resides. That respondents have connections with Nevada and felt harm there is purely incidental to petitioner's alleged conduct.

Transforming respondents' connections with Nevada into connections between *petitioner* and Nevada is unconstitutional alchemy. The Ninth Circuit's use of the plaintiff's forum-state contacts against the defendant achieves, in a roundabout way, the result that a plaintiff's home state can exercise personal jurisdiction over tort defendants who, themselves, have no contacts with that state. The Court should reject the Ninth Circuit's approach and reaffirm that express aiming at the forum state itself is required.

B. The Ninth Circuit's approach is also impossible to reconcile with basic principles of state judicial power. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786–87 (2011) (plurality opinion). Respondents' loss of the use of the seized cash did not occur in Nevada in any meaningful sense. Although a state has legitimate power over a defendant who enters the state either literally or figuratively to cause harm there, a state does not have free-ranging authority over all whose conduct elsewhere is alleged to cause harm that its residents feel wherever they happen to be.

C. The Ninth Circuit's approach imposes serious and unfair burdens on defendants. If a plaintiff's mere allegation that an out-of-state defendant committed an intentional tort elsewhere, but with knowledge of the plaintiff's "significant connections" to the forum state, suffices to hale the defendant into court there, then many defendants will be forced to defend in distant forums with which they lack any real contacts. Law-enforcement officers like petitioner may be the most obvious victims of a rule like the Ninth Circuit's, but a broad swath of other types of

defendants—including journalists and other media and business defendants—will suffer as well if the Court affirms.

II. The Ninth Circuit also erred by concluding that the District of Nevada was a proper venue under § 1391(b)(2) on the rationale that respondents "realized" their "economic injuries" there.

A. The Ninth Circuit's venue holding is contrary to § 1391(b)(2)'s plain text. The statute requires focusing on where "the events or omissions giving rise to the claim occurred." All of petitioner's alleged acts and omissions that gave rise to respondents' claims occurred in the Northern District of Georgia. The Ninth Circuit thought it was sufficient that respondents allege that they felt the loss of the use of the seized cash in Nevada where they reside. Pet. App. 41a. This harm, however, extended throughout the time the cash was in the government's custody and was felt by respondents wherever they happened to be during that time period; it is far too amorphous to qualify as an "event[]" that "occurred" in Nevada.

The Ninth Circuit's error is clear given this Court's holding in *Leroy v. Great West United Corp.* that a cause of action does not "arise" in a district simply because the "impact" of the defendant's conduct is felt there. 443 U.S. 173, 186 (1979). As the Court emphasized, Congress intends venue provisions to protect defendants, so it is "absolutely clear" that an interpretation allowing venue to lie wherever the plaintiff resides, even though the defendant's conduct all occurred elsewhere, cannot be correct. See *id.* at 185, 186.

Perhaps recognizing the infirmity of its reliance on respondents' feeling the loss of the use of the cash in Nevada, the Ninth Circuit pointed to other facts supposedly making venue proper in Nevada, such as the "arrival" of the cash in Nevada when the government returned it to respondents. Pet. App. 42a. The return of the cash is beside the point under § 1391(b)(2), however, because it did not give rise to respondents' claims—the seizure and allegedly wrongful *failure* to return the cash sooner did. The only "events or omissions giving rise to [respondents'] claim[s]" are petitioner's alleged acts and omissions, and they all occurred in the Northern District of Georgia.

B. The context of Congress's enactment of the current version of § 1391(b)(2) confirms that Congress did not intend the reading adopted by the Ninth Circuit. To the contrary, in amending § 1391, Congress removed a provision that made venue for diversity cases proper in the plaintiff's home district. Moreover, other statutes make clear that Congress knows how to make venue dependent on the plaintiff's residence in the unusual circumstances where it desires that result. That Congress did not follow that course in § 1391(b)(2) shows that this Court's admonition in *Leroy* that venue statutes are meant to protect defendants applies fully here and that the Ninth Circuit erred by reading § 1391(b)(2) to permit venue wherever the plaintiff feels the impact of a tort committed elsewhere.

ARGUMENT

The Ninth Circuit concluded, first, that Nevada had personal jurisdiction over petitioner and, second, that venue was proper in the District of Nevada. Because both holdings are necessary for respondents' suit to proceed, and because there is no "mandatory sequencing" for judicial consideration of preliminary, non-merits issues, *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotation marks omitted), this Court could reverse on either ground. Both holdings were erroneous.

I. TO BE HALED INTO COURT BASED ON AN INTENTIONAL TORT, A DEFENDANT MUST HAVE EXPRESSLY AIMED CONDUCT AT THE FORUM STATE, NOT MERELY AT A PERSON WITH KNOWN CONNECTIONS TO THE FORUM STATE

Although this case arises in federal court, because service of process was based on state law, see Fed. R. Civ. P. 4(k)(1)(A), and Nevada's long-arm statute goes to the limits of due process, see Nev. Rev. Stat. § 14.065, respondents have the burden of establishing that the State of Nevada may assert personal jurisdiction over petitioner consistent with the Fourteenth Amendment's Due Process Clause. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 468 n.10 (1985); see also *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 712 (1982) (Powell, J., concurring in the judgment). Respondents cannot satisfy their burden.

A. Due Process Requires Conduct Expressly Aimed At The Forum State Itself

A long line of precedent from this Court makes clear that a defendant must have actual contacts with the forum state before it can exercise jurisdiction over him—which in the intentional-tort context means the defendant must have expressly aimed his conduct at the forum state. Petitioner's conduct, as alleged by respondents, was aimed at them. They happen to have Nevada connections. But petitioner does not.

1. An Out-Of-State Defendant Must Have Purposefully Directed Conduct At The Forum State

As this Court originally understood personal jurisdiction, a state could not exercise jurisdiction over people or property located outside the state. See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878). In the twentieth century, after the "fundamental transformation of our national economy," *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957), this Court abandoned those strict geographic restrictions and held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); see also *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 618 (1990) (opinion of Scalia, J.) ("[T]he defendant's litigation-related 'minimum contacts' may take the

place of physical presence as the basis for jurisdiction.").

Despite the Court's conclusion that jurisdiction need not depend on actual physical presence, it has adhered to the view that minimum-contacts requirements are "more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). For this reason, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Int'l Shoe*, 326 U.S. at 319. Instead, there must be "a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum." *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84, 91 (1978).

The key question is thus whether the defendant has "purposefully directed" his conduct at the forum. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *Burger King*, 471 U.S. at 472; see also *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987) (plurality opinion) (plaintiff must point to "an act of the defendant purposefully directed toward the forum State"); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (plurality opinion). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253.

This requirement "can appear in different guises" depending on the type of case at issue, but whatever the label, "the shared aim of 'purposeful direction' doctrine" is "to ensure that an out-of-state defendant is not bound to appear for merely 'random, fortuitous, or attenuated contacts' with the forum state." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008) (Gorsuch, J.) (quoting *Burger King*, 471 U.S. at 475). Thus, as this Court's cases have repeatedly made clear, courts must assess "the relationship among the defendant, *the forum*, and the litigation" to determine whether the purposeful-direction requirement is satisfied. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (emphasis added); accord *Keeton*, 465 U.S. at 775; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., joined by Alito, J., concurring in the judgment).

In the context of contract-related claims, for example, an out-of-state defendant may be haled into court if "the suit [is] based on a contract which had substantial connection with that State." *McGee*, 355 U.S. at 223. Personal jurisdiction is not proper, however, where the suit "involves the validity of an agreement that was entered without any connection with the forum State." *Hanson*, 357 U.S. at 252. Similarly, a state cannot exercise jurisdiction over an out-of-state parent in a child-support case unless he has "purposefully derive[d] benefit from . . . activities relating to" that state; that the child resides there is insufficient. *Kulko*, 436 U.S. at 96. Likewise, in a personal-injury action, a plaintiff cannot obtain jurisdiction over an out-of-state defendant simply

because the defendant's insurer does business in the forum state; instead, the plaintiff must establish that "the *defendant* engaged in . . . purposeful activity related to the forum." *Rush v. Savchuk*, 444 U.S. 320, 329 (1980) (emphasis in original).

2. *In The Intentional-Tort Context, Purposeful Direction Means Conduct Expressly Aimed At The Forum State*

Calder v. Jones, 465 U.S. 783 (1984), shows how the purposeful-direction requirement applies in the context of intentional torts. In *Calder*, the plaintiff, a California resident whose acting career was based in California, alleged that the defendants, a reporter and an editor who resided in Florida, had libeled her in an article in the *National Enquirer*. The Court held that personal jurisdiction was proper in California.

Several facts were critical to that holding. First, "[t]he allegedly libelous story concerned the California activities of a California resident," one whose "career was centered in California"; second, the story "was drawn from California sources"; and third, "the brunt of the harm, in terms both of [plaintiff's] emotional distress and the injury to her professional reputation, was suffered in California." *Id.* at 788–89. California was thus "the focal point both of the story and of the harm suffered." *Id.* at 789.

The Court also stressed that the defendants were "not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California." *Ibid.* That is, they "knew [their actions] would have a

potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation." *Id.* at 789–90.

Lower courts have distilled *Calder*'s holding into a three-part test, sometimes referred to as the "*Calder* effects test." *E.g.*, *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010); Pet. App. 16a. Under that test, a plaintiff must allege that the defendant committed "(a) an intentional action . . that was (b) expressly aimed at the forum state . . with (c) knowledge that the brunt of the injury would be felt in the forum state." *Dudnikov*, 514 F.3d at 1072.

The express-aiming requirement is critical, for it serves to ensure that the conduct in question has a "substantial connection with th[e] State" hosting the lawsuit, *McGee*, 355 U.S. at 223. Intentional-tort claims by their nature allege that the defendant targeted the plaintiff. If that alone were a sufficient "connection" to the plaintiff's home state, personal jurisdiction would collapse into the merits and would cease to play its constitutionally important role of protecting defendants from having to appear in distant courts based on "random, fortuitous, or attenuated contacts" with the forum state. *Burger King*, 471 U.S. at 475 (internal quotation marks omitted). For this reason, the Seventh Circuit has suggested that the phrase "express aiming test" would be more faithful to *Calder*, for "[i]t properly focuses attention on whether the defendant intentionally aimed its conduct at the forum state, rather than on the possibly incidental and constitutionally

irrelevant effects of that conduct on the plaintiff." *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440, 445 n.1 (2010).

Whatever label is given to the test, the point is that a plaintiff may not hale an out-of-state defendant into court based on an intentional tort unless the defendant's alleged conduct was expressly aimed at the forum state—a requirement that is separate from and in addition to the requirement that the defendant know he will cause harm in the forum state. *Dudnikov*, 514 F.3d at 1072. That much is clear from *Calder*, and no court appears to have questioned it. Tellingly, that includes the Ninth Circuit, which purported to follow the same three-part test that other lower courts use, reciting the requirement that the defendant's conduct be "expressly aimed at the forum state" in addition to *Calder*'s two other prongs. Pet. App. 16a (internal quotation marks omitted).

3. The Ninth Circuit Ignored The Distinction Between Aiming At The Plaintiff And Aiming At The Forum State

Although the Ninth Circuit purported to follow the express-aiming requirement, it erred by equating conduct aimed at the forum state with conduct aimed at a *plaintiff* who has forum-state "connections." See Pet. App. 47a. Under the correct standard, Nevada lacks personal jurisdiction over petitioner, because petitioner has no meaningful contacts with Nevada. That *respondents* have contacts with Nevada does not give Nevada personal jurisdiction over petitioner.

a. The Ninth Circuit reasoned that there is no difference between aiming at the eventual plaintiff and aiming at the state in which the plaintiff files suit: "Walden intentionally targeted persons and funds with substantial connections to Nevada. *He thus expressly aimed his conduct at that state*, providing a sufficient basis for personal jurisdiction." Pet. App. 47a (emphasis added). Respondents have endorsed this holding, arguing that "'individual targeting' of forum residents" is all the express aiming that is required. BIO 24; see Pet. App. 17a–18a.[5]

That is not the law. *Calder* requires a court to assess the "defendant's contacts with the forum State," *Calder*, 465 U.S. at 790—not merely the defendant's contacts with *the plaintiff*. In conducting that inquiry, *Calder* emphasized that the defamatory article was "drawn from California sources" and concerned the plaintiff's "California activities"; and that the plaintiff's "career was centered in California." *Id.* at 789. If targeting of a known forum resident were all that due process required, most of these facts would have been irrelevant.

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[5] Respondents have elided the detail that, even under their allegations, petitioner did not know that respondents were Nevada *residents*, because they presented California driver's licenses. For that reason, the Ninth Circuit had to craft its holding to include not just known forum residents but also those known to have "substantial connections" to the forum state. Pet. App. 47a. Whatever "substantial connections" may mean, this distinction is immaterial because even if respondents had alleged that petitioner knew they were Nevada residents, that would not mean that petitioner aimed his conduct at Nevada.

Likewise, if where the plaintiff felt the harm were all that mattered, the Court would not have stressed that "California [was] the focal point *both of the story and of the harm suffered*," *ibid.* (emphasis added); that California was the focal point of the harm alone would have sufficed. For this reason, lower courts have concluded that, to satisfy *Calder*, the forum state must be "the focal point of the harm suffered by the plaintiff as a result of the tort" *and* "the focal point of the tortious activity." *Imo Indus. v. Kiekert AG*, 155 F.3d 254, 256 (3d Cir. 1998).

Moreover, for the *Calder* Court to have established that targeting a known forum resident is all that due process requires, it would have had to discard a long line of precedent emphasizing that a defendant must have a connection with the forum state itself. See, *e.g.*, *Int'l Shoe*, 326 U.S. at 319; *Kulko*, 436 U.S. at 91; *Rush*, 444 U.S. at 329. Yet the opinion contains no hint that the Court meant to do any such thing; that it was unanimous further confirms that *Calder* did not effect such a silent revolution. See *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985) ("*Calder* did not make the type of dramatic change in the due-process analysis of in personam jurisdiction advocated by the plaintiff. Rather, the so-called 'effects' test is merely another way of assessing the defendant's relevant contacts with the forum State.").

If it were a plausible interpretation of this Court's precedent that aiming at a state is unnecessary, common sense suggests that some court, somewhere, sometime in the 29 years since *Calder*, would have said so. Yet even the court below felt compelled

to acknowledge that the express-aiming requirement is distinct from the other two prongs of the test—namely, that the defendant took intentional action and knew that the plaintiff would suffer harm in the forum state. Pet. App. 16a. Instead of openly dispensing with the requirement, the Ninth Circuit drained it of all meaning by redefining aiming at the plaintiff as aiming at the state. Pet. App. 47a.

This Court's other personal-jurisdiction cases provide additional confirmation that the Ninth Circuit's approach is wrong. The Court has repeatedly rejected the notion that "*the plaintiff's* contacts with the forum are decisive in determining whether the defendant's due process rights are violated." *Rush*, 444 U.S. at 332 (emphasis added). Instead, the defendant must have "judicially cognizable ties with [the] State." *Ibid.*; see also *Kulko*, 436 U.S. at 93–94 (holding that jurisdiction over defendant parent could not depend on plaintiff parent's decision to reside in forum state).

"The plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry." *Keeton*, 465 U.S. at 780. But the plaintiff's residence is relevant only insofar as it bears on *the defendant*'s ties with the state, for the latter are the irreducible "minimum contacts" required by the Due Process Clause. As *Keeton* explained:

> [T]hat inquiry focuses on the relations among the defendant, the forum, and the litigation. Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's res-

> idence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises. See *Calder* . . . .

Ibid.

Similarly, this Court explained in *Goodyear Dunlop Tires Operations, S.A. v. Brown* that "[w]hen a defendant's act outside the forum causes injury in the forum . . . a plaintiff's residence in the forum may strengthen the case for the exercise of specific jurisdiction." 131 S. Ct. 2846, 2857 n.5 (2011) (emphasis omitted) (citing *Calder*, 465 U.S. at 788). If targeting a known forum resident were enough, the plaintiff's residence would not merely "enhance" or "strengthen" defendant's contacts, *Keeton*, 465 U.S. at 780; *Goodyear*, 131 S. Ct. at 2857 n.5, but would instead be "decisive"—a notion this Court has explicitly rejected. *Rush*, 444 U.S. at 332.

The Ninth Circuit's approach is also flawed because it makes personal jurisdiction dependent entirely on the extent to which the defendant foresaw that his actions would harm the plaintiff in the forum state. "Although it has been argued [in dissent] that foreseeability of causing injury in another State should be sufficient to establish such contacts there . . . the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)); see also *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion) ("[I]t is the

defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."); Pet. App. 91a (McKeown, J., dissenting from denial of reh'g) ("With the stroke of a pen, our circuit returns to a discredited era of specific personal jurisdiction, where foreseeability reigns supreme and purposeful direction is irrelevant.").

For these reasons, rather than merely alleging that the defendant targeted a plaintiff with forum-state connections, the plaintiff must point to "actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475 (emphasis in original) (quoting *McGee*, 355 U.S. at 223). Courts must consider "the quality and nature of the defendant's activity," *Hanson*, 357 U.S. at 253, and determine whether it is sufficiently targeted at the forum state. The relevant question is whether the forum state is the "focal point" of the tort. *Calder*, 465 U.S. at 789. An intent to harm a known resident is relevant, but "the key to *Calder* is that the effects of an alleged intentional tort are to be assessed *as part of the analysis of the defendant's relevant contacts with the forum*"—not as a free-standing ground for jurisdiction based on the plaintiff's contacts with the forum. *Wallace*, 778 F.2d at 395 (emphasis added).[6]

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[6] Indeed, because the constitutionally critical focus is the relationship between the defendant and the forum state—not between the defendant and the plaintiff or between the plaintiff and the forum state—an intent to harm someone with known forum connections is not necessary if the defendant expressly aims his conduct at the forum state. A person who fires a bullet

b. Applying that analysis to the facts here, it is clear that petitioner did not expressly aim his conduct at the State of Nevada. Nevada was certainly not the focal point of petitioner's alleged conduct that the court below relied on (preparing a false affidavit). That conduct occurred (if at all) in Georgia. It grew directly out of the seizure of the cash in Georgia. And it was performed to assist in forfeiture proceedings that would have occurred in Georgia.

Although the Ninth Circuit found it dispositive that petitioner allegedly intended to cause respondents harm knowing of their Nevada connections, Pet. App. 47a, respondents' affiliations with Nevada were irrelevant to *petitioner's* alleged conduct. There is no allegation that petitioner targeted respondents *because of* their Nevada connections or that petitioner's actions were "performed for the very purpose of having their consequences felt in [Nevada]." *Johnson*, 614 F.3d at 796 (internal quotation marks omitted); cf. *Dudnikov*, 514 F.3d at 1075 (concluding that defendants expressly aimed conduct at Colorado by contacting company in California in order to cancel an auction in Colorado).

And while respondents claim to have suffered harm in Nevada from the loss of the use of their money, that harm was purely economic and was not tied to Nevada in any meaningful way. Respondents

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across a state border may be haled into the target state's courts even if he did not aim at a specific individual or aimed at an individual who happened to be in the target state at that moment but lacked any "substantial connections" to it, Pet. App. 47a. See *Kulko*, 436 U.S. at 96.

felt the loss of the use of their money wherever they happened to be during the time before it was returned; how much of that time respondents spent in Nevada, and how much time they spent traveling to wherever they chose to travel to, cannot remotely be described as "the focal point" of the alleged tort. That respondents may have been present in Nevada during some or even most of that time is, instead, "incidental" and therefore "constitutionally irrelevant." *Mobile Anesthesiologists*, 623 F.3d at 445 n.1. Thus, even if petitioner "intentionally targeted persons . . with substantial connections to Nevada," Pet. App. 47a, he did not target Nevada itself.

The Ninth Circuit also emphasized that petitioner allegedly targeted "*funds* with substantial connections to Nevada." *Ibid.* (emphasis added). But cash is fungible and portable personal property; although its *owner* can have connections to a state, the cash itself cannot have an independent or meaningful "connection" to a state. Cash is thus at the opposite end of the spectrum from real property. Had petitioner tried to forfeit real property located in Nevada, or perhaps even a bank account located there, petitioner's conduct could be said to have a connection to the State of Nevada. Or if the cash had been buried in respondents' yard in Nevada, petitioner would have expressly aimed at Nevada if he had directed agents to go there and dig it up for forfeiture. Here, however, the allegations are merely that petitioner seized cash physically located in Georgia and tried to obtain forfeiture of that cash in Georgia. Accordingly, that some of the

cash "originated" in Nevada, Pet. App. 45a, cannot support the Ninth Circuit's ruling.[7]

Respondents have complained that petitioner has not "explain[ed] what would be involved in 'aiming conduct at the state itself.'" BIO 25. As an initial matter, the discussion above provides examples of conduct that could be said to be expressly aimed at a state. In all events, while the inquiry into express aiming—like any fact-specific inquiry—may be difficult in some cases at the margins, there is no difficulty here. Nevada has nothing to do with respondents' dispute with petitioner other than the fact that respondents claim to reside there. Nor, indeed, did the Ninth Circuit seriously contend otherwise. Rather than mustering an argument that petitioner's alleged conduct was aimed at Nevada itself, the court of appeals instead stressed that petitioner "targeted *persons* and *funds* with substantial connections to Nevada." Pet. App. 47a; see also Pet. App. 20a (emphasizing that petitioner "must have known and intended that his actions would have impacts *outside Atlanta*" and that he "expressly aimed his actions at people and property he knew from the outset were *not* local" (first emphasis added)).

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[7] The Ninth Circuit's erroneous reliance on the seized cash's "connections" to Nevada is especially puzzling given that most of the cash did *not* leave Nevada with respondents at the beginning of their gambling trip but rather was obtained in New Jersey and Puerto Rico before respondents arrived in Atlanta. See Pet. App. 3a, 21a (noting respondents' allegations that $30,000 of the $97,000 came from Nevada and that "the seized funds included at least $30,000.00 in cash received from legal gaming win[nings] in Puerto Rico").

This amounts to holding that petitioner has the required minimum contacts with Nevada because *respondents* have connections to Nevada and respondents allege that petitioner committed an intentional tort aimed at them. The Ninth Circuit's plaintiff-focused approach does not satisfy due process. It is the defendant who must have connections with the forum state, and that constitutional requirement cannot be redefined out of existence by attributing the plaintiff's forum connections to the defendant. See *Keeton*, 465 U.S. at 780 (because due process inquiry focuses on defendant, plaintiff's lack of contacts with forum state "will not defeat jurisdiction established on the basis of defendant's contacts"). "To find express aiming based solely on" petitioner's alleged intent to harm respondents after learning of their Nevada connections "would make any defendant accused of an intentional tort subject to personal jurisdiction in the plaintiff's home state as soon as the defendant learns what that state is. *Calder* requires more." *Mobile Anesthesiologists*, 623 F.3d at 447.

B. Basic Principles of State Judicial Authority Also Support Requiring Contacts With The Forum State Itself

As explained above, the decision below is inconsistent with a long line of this Court's precedent because it abandons any requirement that the defendant himself have contacts with the forum state. That is more than enough to require reversal. But a further reason to reject the Ninth Circuit's approach is that it is impossible to reconcile with the basic notions of the territorial limits on state judicial

power that, as the plurality opinion in *J. McIntyre* recently reiterated, underlie the minimum-contacts doctrine. Although the Court need not endorse this understanding of personal jurisdiction in order to reverse the Ninth Circuit, it provides strong additional support for petitioner's position.

"[J]urisdiction is in the first instance a question of authority." *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion). Although endorsed only by a plurality in *J. McIntyre*, this understanding finds support in this Court's precedent. See *Hanson*, 357 U.S. at 251 (due process restrictions on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States"); *World-Wide Volkswagen*, 444 U.S. at 291–92 ("The concept of minimum contacts . . . acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.").

Under this theory, "[t]he question" in a personal-jurisdiction case "is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion). States certainly have authority to punish some intentional torts committed by out-of-state defendants. As the *J. McIntyre* plurality explained, "with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws." *Id.* at 2787.

For example, a state would surely have legitimate authority over a defendant who fired a "bullet from one State into another." *Kulko*, 436 U.S. at 96 (citing Restatement (Second) of Conflict of Laws § 37, cmt. a (1971)). Such conduct would be both literally and figuratively aimed at the forum state. A defendant should not be able to use the Due Process Clause to shield himself from a state's power to call him to account when, though remaining outside the state, he has for all intents and purposes entered the state to cause harm there in violation of its laws.

But states do not have free-ranging authority over all who are alleged to cause harm to their residents. They have authority only over those who literally or figuratively enter the state in some way. Where all that is alleged is that the defendant intended to harm an individual who happens to have forum-state connections, the state lacks legitimate authority over the defendant. A state "has a significant interest in redressing injuries that actually occur within the State," *Keeton*, 465 U.S. at 776, but that interest does not extend to situations where the alleged harm did not occur within the state in any meaningful sense but instead was simply harm that—like respondents' loss of the use of their $97,000 in cash—the plaintiff would feel wherever he happened to be present. Cf. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (noting that a state has no "legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819 (1985) (holding that although "Kansas certainly has an interest in regulating . . . conduct in Kansas," it

lacked power to apply its substantive law to adjudicate disputes that arose in other states).

Here, there is no allegation that petitioner made any "attempt to obstruct [Nevada's] laws" or did anything else to submit to the authority of the State of Nevada. *J. McIntyre*, 131 S. Ct. at 2787 (plurality opinion). The alleged harm did not "actually occur within the State" of Nevada in any meaningful sense, and petitioner thus cannot be said to have entered Nevada or to have "commit[ted] torts within its territory." *Keeton*, 465 U.S. at 776 (quotation omitted). Nor do respondents allege that petitioner targeted them *because of* their Nevada connections as a way of attacking Nevada's sovereignty. As a result, the State of Nevada lacks any legitimate authority to hale petitioner from Georgia into Nevada to answer for his alleged conduct in Georgia.

C. The Ninth Circuit's Approach Is Unfair To Defendants

Although minimum-contacts "restrictions are more than a guarantee of immunity from inconvenient or distant litigation," *Hanson*, 357 U.S. at 251, "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum" is nonetheless an important practical purpose of that doctrine, *World-Wide Volkswagen*, 444 U.S. at 292. The serious and unfair burdens that the Ninth Circuit's approach places on defendants reinforce the conclusion that it is inconsistent with due process.

1. The personal-jurisdiction rules in this intentional-tort context effectively sweep in not only wrongdoers, but also all those falsely or incorrectly

accused of wrongdoing. In many areas, the facts that support personal jurisdiction will be either uncontested or, at least, distinct from the underlying merits of the case. For example, in a case like *Burger King*, there was no dispute that the parties had a contractual relationship; that relationship having been established, the Florida courts had jurisdiction to decide which party was in the right under the contract. 471 U.S. at 479–80.

The intentional-tort context is different. Here, for example, the basis on which the Ninth Circuit found jurisdiction is petitioner's supposed preparation of a false affidavit. But petitioner disputes drafting any affidavit at all—let alone a false one. The Ninth Circuit's finding that respondents can drag petitioner to Nevada to defend depends entirely on the assumption that their allegation that he intended to harm them is correct. If that allegation is not correct, respondents would not even have the flimsiest of bases to seek personal jurisdiction over petitioner in Nevada; petitioner would not have expressly aimed at respondents *or* Nevada.

For these reasons, the rule that the Court adopts here will govern personal jurisdiction for fictional intentional torts as well as real ones, for innocent defendants as well as actual tortfeasors. If a mere allegation of an act aimed at the plaintiff while knowing of the plaintiff's connections to the eventual forum state is sufficient, many defendants will be subjected to the burdens of defending in distant forums even though that allegation is untrue and the forum state in effect never properly had personal

jurisdiction in the first place. See generally Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. Davis L. Rev. 1301 (2012).

2. Affirming the Ninth Circuit's ruling would have pernicious effects on many types of potential defendants who could be accused of intentional torts and forced to litigate far from home.

a. *Law-enforcement officers.* As the facts here illustrate, the Ninth Circuit's ruling has obvious and dangerous consequences for law-enforcement officers. Any officer who interacts with out-of-state individuals and has opportunities to learn of their residence would be subject to suit all over the country. For example, a Transportation Security Administration officer who checks a traveler's driver's license and refuses to allow him access to a secure area or requires him to undergo heightened security screening could be sued anywhere. By virtue of examining the plaintiff's driver's license, the officer will know his state of residence and will thus know that any emotional distress she causes him will be felt in that state.

The Ninth Circuit brushed aside these concerns, reasoning that the burden on petitioner of having to defend this suit thousands of miles from home is minimal because he initially received free representation by the U.S. Department of Justice, "the world's largest law firm with offices in all fifty states." Pet. App. 33a (internal quotation marks omitted). As this case illustrates, however, *Bivens* defendants do not necessarily receive DOJ representation at all stages of a case or for all purposes, and DOJ representation

is never an entitlement, see 28 C.F.R. §§ 50.15, 50.16. In all events, that DOJ representation is sometimes available cannot mean that *Bivens* defendants are not entitled to the protections of the Due Process Clause. *Bivens* claims, after all, are personal-capacity claims against the officer as an individual, not against the United States or the officer's employing agency. Suits like respondents' threaten officers' personal finances and their good names. See *Stafford v. Briggs*, 444 U.S. 527, 544 (1980).

Moreover, the Ninth Circuit's interpretation of express aiming is in no way limited to *federal* law enforcement officers. If this Court agrees with the Ninth Circuit, state and local officers who interact with travelers will be haled into distant forums in suits brought under 42 U.S.C. § 1983, which are far more numerous than *Bivens* suits. For example, a state trooper accused of wrongful conduct after pulling over a car on the New Jersey Turnpike could be sued in Texas if the car has Texas license plates or the driver shows a Texas driver's license. Those who keep our nation safe deserve more protection than that.

b. *Journalists and publishers.* Adopting the Ninth Circuit's approach would also require journalists, editors, publishers, and other media defendants to travel to a plaintiff's home state to defend whenever the subject of a story sues for defamation. Lower courts that apply the express-aiming requirement more rigorously than the Ninth Circuit have relied on *Calder* to reject personal jurisdiction over defamation suits based on stories that, while aimed at a forum-state resident, were not

aimed at the forum state itself. For example, in *Young v. New Haven Advocate*, the Fourth Circuit confronted the argument that "two Connecticut newspapers and certain of their staff . . . subjected themselves to personal jurisdiction in Virginia by posting on the Internet news articles that, in the context of discussing the State of Connecticut's policy of housing its prisoners in Virginia institutions, allegedly defamed the warden of a Virginia prison." 315 F.3d 256, 258 (4th Cir. 2002). The defendants targeted the plaintiff and knew of his Virginia connections, but the Fourth Circuit explained that the key question under *Calder* was "whether the defendant[s] ha[d] expressly aimed or directed [their] conduct toward the forum state." *Id.* at 262. The answer to that question was no, because the defendants did not "manifest an intent to target and focus on Virginia readers." *Id.* at 263.

Under the Ninth Circuit's reasoning, cases like *Young* would come out the other way. Subjects of unflattering stories will be able to sue in their home states, even if the stories were not distributed in that state or otherwise targeted towards readers in that state and even if the stories were not drawn from sources in that state; writing a story about a forum-state resident would be sufficient, even if the forum state was not the focal point of the story. But see *Calder*, 465 U.S. at 788–89. A ruling here will apply to media defendants with full force, given that the Court has "reject[ed] the suggestion that First Amendment concerns enter into the jurisdictional analysis." *Id.* at 790.

c. *Internet users.* Adopting the Ninth Circuit's approach also would pose serious concerns in the digital realm. Because material posted on the internet can be read anywhere in the world, the prospect of "overreaching jurisdiction" is particularly troubling in this context. *Millennium Enters. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 923 (D. Or. 1999). If the Ninth Circuit's view prevails, a blogger, bulletin-board poster, or Twitter user who writes something that is allegedly defamatory or who allegedly infringes on someone's intellectual property rights could be sued in the plaintiff's home state, just like the traditional media defendants discussed above.

Courts have repeatedly relied on *Calder* to dismiss such suits where there is no evidence that the internet poster targeted the plaintiff's home state in any meaningful way. See, *e.g.*, *Johnson*, 614 F.3d at 796 (dismissing defamation suit based on bulletin-board postings where there was no evidence that allegedly defamatory statements "specifically targeted" forum state, even though defendant knew plaintiff resided in forum state); *Millennium*, 33 F. Supp. 2d at 922 (dismissing trademark-infringement claim in absence of any showing that defendant's website was "aimed intentionally at" forum state). Those cases would come out the other way under the Ninth Circuit's approach, thereby "dramatically chilling what may well be the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen." *Id.* at 923.

d. *Business defendants.* Business defendants, too, will feel the effects of a ruling in respondents' favor. If the Ninth Circuit is right, an individual or

firm can sue an out-of-state competitor in the plaintiff's home state, alleging trademark infringement or another business tort—even if neither the defendant nor the tort had any connection to the forum state other than the alleged injury to the plaintiff. Courts have rightly concluded that express aiming was absent in such cases.

For example, in *ESAB Group, Inc. v. Centricut, Inc.*, the plaintiff, a company headquartered in South Carolina, accused a New Hampshire-based competitor of tortiously conspiring with one of the plaintiff's employees in Florida to take sales leads from the plaintiff for customers "located across the United States and Canada." 126 F.3d 617, 625 (4th Cir. 1997). The Fourth Circuit found no express aiming at South Carolina; although the lost sales "were ultimately felt in South Carolina at the [plaintiff's] headquarters," this was "too unfocused to justify personal jurisdiction." *Ibid.* Similarly, in *Mobile Anesthesiologists*, the Seventh Circuit concluded that a Texas-based corporation accused of trademark infringement by an Illinois-based company had not expressly aimed its conduct at Illinois, even though the plaintiff alleged that the defendant knew of the plaintiff's trademark and Illinois residence. 623 F.3d at 446. Affirming the decision below would upend these eminently sensible results.

* * * * *

The Ninth Circuit concluded that petitioner expressly aimed his conduct at the State of Nevada solely because respondents allege that he targeted them while knowing that *they* had connections to Nevada. The Due Process Clause requires, however,

that petitioner himself have connections to Nevada. A plaintiff's forum-state connections cannot substitute for the constitutionally required minimum contacts by the defendant. Because petitioner has no contacts with Nevada, this Court should reverse the Ninth Circuit's ruling.

II. THE PLACE WHERE A PLAINTIFF FEELS THE EFFECTS OF A TORT IS NOT A PROPER VENUE UNDER 28 U.S.C. § 1391(b)(2) IF THE DEFENDANT'S CONDUCT ALL OCCURRED ELSEWHERE

In addition to ruling that Nevada could exercise personal jurisdiction over petitioner, the court below ruled that the District of Nevada was a proper venue under 28 U.S.C. § 1391(b)(2), which, as relevant here, provides that "[a] civil action may be brought in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." Focusing on where respondents felt the effects of petitioner's alleged conduct, the Ninth Circuit held that venue was proper because "[a]ll the economic injuries suffered by [respondents] were realized in Nevada." Pet. App. 41a.

The Ninth Circuit's plaintiff-focused approach to venue is contrary to § 1391(b)(2)'s text, which instructs courts to determine where the "events or omissions giving rise to the claim occurred"—not where the effects of those events were felt. The Ninth Circuit also lost sight of the fundamental point that venue provisions like § 1391(b)(2) are intended to protect defendants—not to allow plaintiffs to lay venue wherever they reside, which is the import of the decision below.

A. The Ninth Circuit's Conclusion That Venue Was Proper Has No Basis In § 1391(b)(2)'s Text

Under the Ninth Circuit's approach, venue is proper in a district if the plaintiff "suffered harm" there or was otherwise "affected" there by an alleged tort, even if the tort occurred elsewhere and the only harm alleged, as in this case, is the economic consequences of the tort. Pet. App. 41a–42a. This approach is impossible to reconcile with § 1391(b)(2)'s plain text, which requires the court to look to where "the events or omissions giving rise to the claim occurred," especially given the normal purpose of venue provisions—namely, "protect[ing] the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183–84 (1979) (emphasis in original). Instead, in cases like this where the only injury alleged is economic, venue is proper only in the district or districts where the defendant's alleged conduct occurred. Neither respondents' loss of the use of their cash during the period before the government returned it, nor any of the other facts on which the Ninth Circuit relied, can be described as "events or omissions giving rise to [their] claim[s]." The statute thus requires focusing on petitioner's alleged conduct giving rise to their claims, all of which occurred in the Northern District of Georgia.

1. The Place Where A Plaintiff Merely Feels The Consequences Of An Alleged Tort Occurring Elsewhere Is Not A Proper Venue Under § 1391(b)(2)

a. Section 1391(b)(2) restricts venue to districts in which "the events or omissions giving rise to the claim occurred." This Court made clear in *Leroy* that a claim does not arise in a district simply because the plaintiff alleges that he felt the impact of the defendant's actions there. 443 U.S. at 185–86. There, the Court confronted an earlier version of § 1391(b) that permitted venue in the district "in which the claim arose." *Id.* at 178 n.8. The plaintiff wanted to initiate a tender offer in Texas. An Idaho statute arguably precluded the tender offer. The plaintiff filed suit in the Northern District of Texas against the Idaho officials in charge of enforcing the statute, seeking a declaration that it was unconstitutional. *Id.* at 177, 183. The plaintiff argued that its claim arose in Texas, because that is where the statute had its "impact" in terms of precluding the tender offer. *Id.* at 186. The Court rejected that argument; because the case involved "action that was taken in Idaho by Idaho residents," it had only "one obvious locus—the District of Idaho." *Id.* at 185.

In reaching this conclusion, the Court relied heavily on the fact that "[i]n most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Id.* at 183–84 (emphasis in original). This important purpose of venue provisions dates to the founding: As this Court has observed, "[t]he first restrictions on venue in the

federal courts," which "were set forth in the Judiciary Act of 1789," required civil suits against non-aliens to be brought in the district where the defendant resided or could be found at the time the lawsuit commenced. *Brunette Mach. Works, Ltd. v. Kockum Indus.*, 406 U.S. 706, 708 (1972) (citing 1 Stat. 79).

The Court in *Leroy* did not dispute that the plaintiff suffered injury in Texas, but given the defendant-protective purpose of the venue provision it was "absolutely clear" that "Congress did not intend to provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts." 443 U.S. at 185. A reading that would have "subject[ed] the Idaho officials to suit in almost every district in the country" simply could not be right. *Id.* at 186.

The venue statute has been amended since *Leroy* to allow for venue in the district or districts "in which a substantial part of the events or omissions giving rise to the claim occurred," rather than requiring the court to pinpoint the single district "in which the claim arose." But *Leroy*'s reasoning continues to apply with full force. At least in a case alleging only economic harm like the loss of the use of money, the alleged tort does not arise in the plaintiff's home district merely because the plaintiff feels the "impact" of the alleged tort there. *Ibid.* Instead, what matters is where the relevant "action[s]" occurred. *Ibid.*

If anything, it is all the more clear under § 1391(b)(2)'s current text that the place where the plaintiff merely feels the impact of a tort occurring elsewhere is not a proper venue. The statute now

permits venue only in districts where "events" or "omissions" giving rise to the claim "occurred." Although a plaintiff may feel the economic impact of a seizure of funds in the district where he resides or where he is otherwise present, such effects cannot be described as either "events" or "omissions" that "occur[]" in that place.

An "event" is "something that occurs in a certain place during a particular interval of time." Random House Webster's Unabridged Dictionary 671 (2d ed. 1998). Having less money to spend during the months that seized cash is in the government's custody is not a discrete occurrence that can be situated in a certain place at a particular time. Rather, it is simply an effect that continues indefinitely as a consequence of an earlier "event"—the seizure of the cash—and that the plaintiff will feel wherever he happens to be during the time the cash remains in the government's hands.

Nor can this economic impact be described as an "omission." As the Eighth Circuit noted, "it is not easy to know how *a plaintiff's* 'omissions' could ever be relevant to whether a claim has arisen." *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995) (emphasis added). Indeed, the statute's use of "omissions" is strong evidence that Congress intended the focus to be on the defendant's conduct; when an "omission" gives rise to a civil claim, it is because *the defendant* has failed to do something he was obligated to do. Thus, in a case like this one, where the alleged injury consists of feeling negative effects of tortious conduct that occurred elsewhere, the only "events" and "omis-

sions" for a court to consider are the alleged actions or failures to act by the defendant.

This Court's decision in *Richards v. United States*, 369 U.S. 1 (1962), provides strong support for this approach. The question in that case was what state's law applies under the Federal Tort Claims Act, which creates liability for certain harms "caused by the negligent or wrongful act or omission" of government employees, depending on "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The Court rejected "the argument that Congress intended the words 'act or omission' to refer to the place where the negligence had its operative effect," 369 U.S. at 10, and concluded instead that the statute referred to "the place where the negligence occurred." *Id.* at 9.

So too with § 1391(b)(2). Where the alleged tortious conduct is an "event" or an "omission," and where the economic impact on the plaintiff is too amorphous and unfocused to be described as an "event," the plain language of the statute requires the court to consider only where the defendant's alleged conduct occurred and not where that conduct had its "operative effect."

b. The Ninth Circuit's conclusion that venue was proper in Nevada is thus contrary to the plain language of § 1391(b)(2). The Ninth Circuit stated that petitioner's alleged tortious conduct caused respondents to suffer the "loss of use and interest on the funds for nearly seven months" and found it critical that respondents felt that loss in Nevada. Pet. App. 41a. As explained, however, a plaintiff will *always* feel certain consequences of tortious con-

duct—such as the loss of the use of money, emotional distress, or pain and suffering—wherever the plaintiff happens to be. Those effects are simply not "events or omissions giving rise to the claim" under any plausible reading of the statutory text. As a result, that respondents experienced the loss of the use of their cash in Nevada, as opposed to somewhere else, is beside the point under § 1391(b)(2).

If, for example, respondents had moved to Alaska the week after their cash was seized, they would have experienced harm in Alaska by virtue of having less money to spend there—making venue proper there if the Ninth Circuit is correct that the place where a plaintiff feels harm from conduct occurring elsewnere is a proper venue. Respondents' presence in Nevada during the time the government had custody of their funds was just as incidental to their claims against petitioner. No matter where respondents happened to reside, or where they traveled to, they would have felt the same impact from not having their $97,000 to spend.

In short, the only "events" and "omissions" that gave rise to respondents' claims are petitioner's alleged acts: petitioner's seizure of respondents' cash and his subsequent preparation of the supposedly false affidavit. That conduct occurred (if at all) entirely in the Northern District of Georgia.[8]

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[8] Even if feeling the effects of the loss of the use of their money could somehow be thought an "event[] giving rise to [respondents'] claim[s]" that "occurred" in Nevada, Nevada would fail § 1391(b)(2)'s requirement that "a substantial part of the

This analysis is clear under the text of § 1391(b)(2), so there is no need to go further. As in *Leroy*, however, the overarching defendant-protective purpose of the statute makes it all the more clear that the Ninth Circuit's holding is wrong. Although the Ninth Circuit phrased its conclusion in terms of the locus of respondents' injury rather than holding openly that venue lies in the district where the plaintiff resides, the practical effect is largely the same. Plaintiffs will feel the effects of torts wherever they happen to be, which usually will include where they reside. On this plaintiff-focused approach, § 1391(b)(2) provides no protection to defendants at all. Defendants like petitioner could be sued in "every district in the country"—precisely the result that the Court in *Leroy* recognized that Congress could not have intended. 443 U.S. at 186; see also *id.* at 185 (stating that "the convenience of the defendant (but *not* of the plaintiff)" is relevant for venue) (emphasis in original; footnote omitted).

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events or omissions giving rise to the claim [have] occurred" in that district. "Substantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship with the dispute." *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). Nevada has "no real relationship" with this dispute, which concerns whether petitioner was justified in allegedly seizing respondents' funds in Georgia and pursuing the forfeiture of those funds in Georgia. In the face of actual "events" occurring in Georgia that gave rise to respondents' claims, their amorphous feeling in Nevada of effects of those events in Georgia cannot justify venue in Nevada.

2. *The Other Facts On Which The Ninth Circuit Relied Do Not Support Its Venue Holding*

In addition to relying on respondents' loss of use of their funds in Nevada, the Ninth Circuit sought to justify its venue holding by pointing to several "facts concerning the origin and legitimacy of the $97,000" that were "connected to Nevada." Pet. App. 41a. The court noted that "the $30,000 'bank' originated in Nevada," "the documentation of the legitimacy of the money was sent from Nevada," and "the funds eventually were returned to Fiore and Gipson in Nevada." Pet. App. 41a–42a. None of these facts is sufficient to support venue in Nevada.

As an initial matter, the fact that some of the seized money "originated" in Nevada is neither an "event" nor an "omission." It is therefore irrelevant for purposes of § 1391(b)(2). And why the "origin" of cash should ever be relevant for venue purposes is difficult to understand. Cash is a portable physical object and a fungible good; although the cash's *owner* may have "substantial connections" (Pet. App. 47a) to a particular district or districts, the cash itself has no meaningful connection to any particular place and no physical connection to any place other than wherever it happens to be stored.

Some of the other facts enumerated by the Ninth Circuit (such as respondents' mailing of documentation) can be described as "events," unlike respondents' feeling the effects of the loss of the use of their cash. But none establishes venue under § 1391(b)(2), because none gave rise to respondents' claims.

Section 1391(b)(2) does not speak of events that are merely "related to the claim." Instead, it makes venue depend on the location of the events that "giv[e] rise to the claim." Without addressing this plain language, the Ninth Circuit and respondents seemingly take the position that listing facts that are somehow associated with the claim is enough. See Pet. App. 41a–42a; BIO 31–32. It is not. To "giv[e] rise to the claim," an event or omission must form a necessary component of the claim itself. See Random House Webster's Unabridged Dictionary 1660 (defining "give rise to" as "to originate; produce; cause"); Merriam Webster's Collegiate Dictionary 493 (10th ed. 1994) (defining "give rise to" as "to be the cause or source of").

None of the events to which the Ninth Circuit pointed satisfies this standard. Respondents' mailing of documentation of the legitimacy of the money did not give rise to their claims; petitioner's alleged refusal to recognize that proof and persistence in pursuing forfeiture did. Pet. App. 6a–7a; J.A. 34–36. As for the "arrival" of respondents' funds in Nevada, the Ninth Circuit asserted that it "caused Fiore and Gipson's cause of action to mature, because their case was not ripe until the government abandoned the forfeiture case against them." Pet. App. 42a (citing *Albright v. Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J., concurring)). This badly misses the point. First, Justice Ginsburg's concurring opinion in *Albright* says nothing about ripeness, but instead suggests that the statute of limitations on a Fourth Amendment claim does not begin to run until a seizure ends. See 510 U.S. at 280. Even assuming that the limitations period did not start to run until

the seizure ended, it does not follow that respondents' claims did not "arise" until then. Cf. *Heck v. Humphrey*, 512 U.S. 477, 489 (1994) (explaining the difference between a claim arising and accrual for limitations purposes). But more fundamentally, the government's return of the cash is the *opposite* of what respondents are complaining about. The seizure and delay in returning the funds gave rise to their claims; the return of the funds did not.

And even if (contrary to fact) "abandonment" of the potential forfeiture case gave rise to respondents' claims, that would not justify the decision below. That abandonment occurred in the Northern District of Georgia, where the AUSA decided not to pursue forfeiture, not in Nevada, J.A. 30–31. Once the government decided not to seek forfeiture, respondents' funds would have been returned to them wherever they—or their lawyer—happened to be. The happenstance that respondents received their cash in Nevada has nothing to do with respondents' claims against petitioner.

3. Petitioner's Conduct Is The Only Relevant Factor Here

As explained above, § 1391(b)(2) requires focusing on "the events or omissions giving rise to the claim," and here the only events or omissions giving rise to respondents' claims were petitioner's alleged actions. The only relevant factor under the statute in this case is therefore petitioner's conduct, all of which occurred in the Northern District of Georgia.

Several courts of appeals have suggested that the defendant's conduct is the only relevant factor

under § 1391(b)(2): "by referring to 'events or omissions giving rise to the claim,' Congress meant to require courts to focus on relevant activities of the defendant, not of the plaintiff." *Woodke*, 70 F.3d at 985; see *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408 (2d Cir. 2005); *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371–72 (11th Cir. 2003). In intentional-tort cases like this one, that approach is correct. In such cases, the only events and omissions giving rise to the claim are acts and omissions by the defendant, and the defendant's conduct thus should be the exclusive focus of the § 1391(b)(2) inquiry.

Nonetheless, the Court need not decide that the defendant's conduct must be the exclusive focus in *every* case governed by § 1391(b)(2). That provision governs federal civil cases of every stripe, and its text may apply in different ways to different situations.

For example, in a product-liability case, venue might be appropriate in the district where the product malfunctions and causes physical injury. See, *e.g.*, *J. McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) ("[T]he State in which the injury occurred would seem most suitable for litigation of a products liability tort claim." (citing, *inter alia*, § 1391(b)(2)'s predecessor provisions)). Contrary to the Ninth Circuit's approach, however, that district would be proper not because it is the locus of the injury *qua* injury, see Pet. App. 41a, but rather because the malfunction and immediately resulting physical injury can be fairly described as an "event[] . . . giving rise to the claim" that "occurred" there. Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704–12 (2004) (holding that a personal-injury claim "arising in a foreign country,"

28 U.S.C. § 2680(k), is one where the physical injury occurs in a foreign country).

Similarly, in a dispute over an insurer's duty to pay for an accident, the location where the accident occurred may be a proper venue. See *Uffner v. La Reunion Francaise, S.A.*, 244 F.3d 38, 43 (1st Cir. 2001). Again, venue would not be proper there on the ground that the injury occurred there; indeed, the vessel owner's economic injury would likely be felt where the owner resides and not necessarily where the accident occurred. But the accident could be understood as an "event" that is "the source of" the lawsuit. See *supra* at 50. In other words, "an event" can give rise to a claim without being "a point of dispute between the parties." *Uffner*, 244 F.3d at 43.[9]

However the Court may resolve the application of § 1391(b)(2) in other types of cases in the future, in

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[9] For similar reasons, an event need not necessarily be "wrongful" to give rise to a claim. The Eighth Circuit's suggestion that § 1391(b)(2) requires focusing on the "events or omissions" alleged to be "wrongful," *Woodke*, 70 F.3d at 986, makes sense in an intentional-tort case where by definition the plaintiff is alleging that the defendant's conduct giving rise to the claim was wrongful. Not all claims involve wrongful conduct, however. In *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, for example, the plaintiff was seeking to vacate or modify an arbitral award, not alleging an intentional tort. 529 U.S. 193 (2000). The Court stated that § 1391(b)(2) permitted venue in the district where the underlying construction contract was performed and where, accordingly, "a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action [was] situated." *Id.* at 198.

the present case the analysis is straightforward and dictated by the plain language of the statute. As explained above, respondents' ongoing inability to use their seized cash during the time it was in the government's custody cannot be described as an "event[]" or an "omission[]" that "occurred" in Nevada (or anywhere else). An injury that the plaintiff feels wherever she happens to be cannot justify laying venue in the plaintiff's home district on the theory that she felt the injury there while ignoring that all of the allegedly tortious events and omissions occurred elsewhere.

B. Congress Did Not Intend Venue Under § 1391(b)(2) to Lie Wherever the Plaintiff Feels Effects of a Tort

Although § 1391(b)(2)'s text provides reason enough to reject the Ninth Circuit's reading, evidence of Congress's intent makes it even clearer that the Ninth Circuit erred. Far from suggesting that Congress amended § 1391(b) to create the current version because it was unhappy with *Leroy* or sought to break with the normal defendant-protective purpose of statutory venue provisions, all evidence confirms that Congress did not intend § 1391(b)(2) to allow venue wherever the plaintiff feels the impact of a tort occurring elsewhere.

Congress amended § 1391(b) because "it was oftentimes difficult to pinpoint the *single* district in which a 'claim arose,'" as the prior version seemingly required; Congress therefore authorized venue in multiple districts in cases where "a substantial part of the events or omissions giving rise to the claim" occurred in multiple districts. *Jenkins Brick*, 321

F.3d at 1371 (emphasis added); see also H.R. Rep. No. 101-734, at 23 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6869 (amendment "avoids the problem created by the frequent cases in which substantial parts of the underlying events have occurred in several districts"). In the Third Circuit's words, the amendment "was based on the underlying aim of simplifying litigation rather than displacing the existing policy that showed due consideration for the defendant." *Cottman*, 36 F.3d at 294. Thus, "[t]he new language . . . does not mean . . that the amended statute no longer emphasizes the importance of the place where the wrong has been committed." *Jenkins Brick*, 321 F.3d at 1371.[10]

It is in fact quite clear from the context of § 1391(b)(2)'s enactment that Congress did not intend the approach adopted by the Ninth Circuit. Before 1990, § 1391 allowed venue in diversity actions "in the judicial district where all plaintiffs . . . reside." 28 U.S.C. § 1391(a) (1988). In amending the statute, Congress largely adopted the views of the Federal Courts Study Committee, which had argued that the

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[10] Before 2011, § 1391 contained separate venue provisions for diversity and federal-question cases that both authorized venue in a district "in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2) (2006) (diversity); *id.* § 1391(b)(2) (federal question). Congress's 2011 amendment eliminated other separate requirements for the two types of cases but did not change the text, now contained in § 1391(b)(2), that governs this federal-question case. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763 (2011).

old statute "perversely favor[ed] home-state plaintiffs in diversity cases." Report of the Federal Courts Study Committee 94 (Apr. 2, 1990); see also *ibid.* ("[I]f a litigation has a significant relation to a plaintiff's home state, it may be brought there; if it has no such relation, the plaintiff's residence alone should not suffice for venue.").[11]

It would be strange indeed if Congress, while removing a provision that allowed diversity plaintiffs to sue in their home states, at the same time allowed *both* diversity and federal-question plaintiffs to sue wherever they claimed to feel the consequences of the defendant's conduct—which will ordinarily include their home state. Had Congress intended that result, it could simply have revised the old statute to remove its limitation to diversity suits. For this reason, the leading civil procedure treatise explains that "the suffering of economic harm within a district is not sufficient without more to warrant transactional venue in that district . because otherwise venue almost always would be proper at the place of the plaintiff's residence, an option that Congress explicitly removed with the 1990 amendments to the diversity portion of the statute." 14D Wright, Miller & Cooper, *Federal Practice and Procedure* § 3806.1 (3d ed. 2007).

Moreover, other statutes make clear that Congress knows how to make venue dependent on the plaintiff's residence in the rare circumstances where

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[11] Available at www.fjc.gov/public/pdf.nsf/lookup/repfcsc.pdf/$file/repfcsc.pdf.

it so desires. See, *e.g.*, 28 U.S.C. § 1402(b) (providing for venue for certain claims against the United States "in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred"); 28 U.S.C. § 1391(e)(1)(C) (providing for venue for official-capacity suits against officers of the United States "in any judicial district in which . the plaintiff resides if no real property is involved in the action"). That Congress did not follow that course in § 1391(b)(2) is strong evidence that it did not intend to permit venue wherever the plaintiff feels the impact of a tort that occurred elsewhere.

It is also notable that the provisions in which Congress has authorized venue where the plaintiff resides govern suits against the United States.[12] The federal government feels no inconvenience from being sued anywhere in the United States, but individual defendants do. That was the very reason why the Court held in *Stafford v. Briggs*, 444 U.S. 527 (1980), that § 1391(e) applied only to official-capacity suits against the government and not individual-capacity suits like this one against law-enforcement officers sued personally. The Court recognized that Congress

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[12] An additional example of a provision laying venue at the plaintiff's residence is 18 U.S.C. § 2334(a), which permits suits based on injuries resulting from international terrorism to be brought in a "district where any plaintiff resides." Many defendants sued under this statute will be aliens, for whom no particular district is a natural or convenient venue. And in any event, it would be unsurprising for Congress to be less solicitous of the need to protect defendants from inconvenient venue in the unique context of claims for injuries caused by international terrorism.

could not have intended § 1391(e) to be 'the master key which would unlock the door to nationwide venue for money damages actions brought . gainst an official as an individual." *Id.* at 539.

Given *Stafford*, and given that Congress traditionally enacts venue statutes "to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial," *Leroy*, 443 U.S. at 183–84 (emphasis in original), it would have been highly anomalous for Congress to intend § 1391(b)(2) to be just such a "master key." There is not a shred of evidence that Congress so intended.[13]

* * * * *

Section 1391(b)(2) allows venue in a district only if "a substantial part of the events or omissions

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[13] The Ninth Circuit's venue holding, like its personal-jurisdiction holding, would have pernicious consequences for many types of defendants if accepted by this Court. See *supra* Part I.C. Respondents have suggested that the possibility of transfer for convenience under 28 U.S.C. § 1404(a) makes it unnecessary to be concerned about the Ninth Circuit's reading of § 1391(b)(2). BIO 33. But plaintiffs who opt to file suit in their home district against distant defendants will oppose transfer; defendants will have to devote substantial resources to litigating transfer motions in the very forum where they should not have to defend in the first place; and such motions are largely committed to the district court's discretion and thus of uncertain benefit. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). More fundamentally, the possibility that some defendants may obtain discretionary transfer is hardly a reason to construe § 1391(b)(2), contrary to its text and to all indications of Congress's intent, to permit venue wherever the plaintiff feels the effects of tortious "events or omissions" occurring elsewhere.

giving rise to the claim occurred" there. The only events and omissions giving rise to respondents' claims were petitioner's alleged actions and omissions, all of which occurred in the Northern District of Georgia. The Ninth Circuit erred by holding that venue was proper in the District of Nevada.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 1391 provides:

Venue generally

(a) APPLICABILITY OF SECTION.

Except as otherwise provided by law—

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) VENUE IN GENERAL.

A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) RESIDENCY.

For all venue purposes—

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) RESIDENCY OF CORPORATIONS IN STATES WITH MULTIPLE DISTRICTS.

For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal

jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) ACTIONS WHERE DEFENDANT IS OFFICER OR EMPLOYEE OF THE UNITED STATES.

(1) IN GENERAL.

A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which

(A) a defendant in the action resides,

(B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) SERVICE.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that

the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) CIVIL ACTIONS AGAINST A FOREIGN STATE.

A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) MULTIPARTY, MULTIFORUM LITIGATION.

A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

RESPONDENT'S BRIEF

No. 12-574

IN THE

Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the Due Process Clause forbids Nevada courts from exercising personal jurisdiction over a defendant who intentionally targets Nevada residents for injury in that state?

2. Whether the general federal venue provision, 28 U.S.C. § 1391(b)(2), categorically limits venue to the district of the defendant's acts or omissions, or otherwise categorically forbids venue in the district in which the plaintiffs suffered the injury giving rise to their claim.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

I. Factual Background 1

II. Procedural History 6

A. District Court Proceedings 6

B. Court Of Appeals Decision 7

SUMMARY OF THE ARGUMENT 14

ARGUMENT 18

I. Petitioner Established "Minimum Contacts" With Nevada By Intentionally Targeting Respondents For Injury In Las Vegas. 20

A. Petitioner's Actions Established Minimum Contacts With Nevada Under *Calder v. Jones*. 22

1. This Court's Due Process Cases Draw A Fundamental Distinction Between Intentional Torts Against Targeted Victims And "Mere Untargeted Negligence." 23

2. Under *Calder v. Jones*, A Defendant Establishes Sufficient Minimum Contacts With A Forum When He Intentionally Targets The Plaintiff For Injury In That Forum 25

3. There Is Nothing Unfair About A State Exercising Jurisdiction Over A Defendant Who Intentionally Targets

State Residents For Injury In The Forum. 33

4. Respect For State Sovereignty Requires That Each State Be Allowed To Exercise Jurisdiction Over Those Who Target Its Residents For Injury Within The State..... 37

5. Petitioner Has Sufficient Minimum Contacts With Nevada To Support Personal Jurisdiction Over Respondents' False Affidavit Claim. 44

B. Any Special Concerns Regarding Law Enforcement Defendants Are Appropriately Considered As Part Of The Reasonableness Inquiry, Which Petitioner Does Not Raise In This Court..... 45

II. The Court Of Appeals Correctly Rejected Petitioner's Venue Objections..... 49

A. Section 1391(b)(2) Does Not Limit Venue To The Place Of The Defendant's Wrongful Conduct..... 50

B. Section 1391(b)(2) Does Not Forbid Venue In The District In Which The Plaintiff Suffers The Injury Giving Rise To The Claims. 55

C. Petitioner's Case-Specific Objections To The Court Of Appeals' Fact-Bound Venue Decision Provide No Basis For Reversal. 58

CONCLUSION 60

TABLE OF AUTHORITIES

Cases

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 6, 11

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) ..... passim

Calder v. Jones,
465 U.S. 783 (1984) ..... passim

Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.,
529 U.S. 193 (2000) 52

Delaware State College v. Ricks,
449 U.S. 250 (1980) 27

Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,
514 F.3d 1063 (10th Cir. 2008) 40

Hanson v. Denckla,
357 U.S. 235 (1958) 19, 23

International Shoe Co. v. Washington,
326 U.S. 310 (1945) ..... passim

J. McIntyre Machinery, Ltd. v. Nicastro,
131 S. Ct. 2780 (2011) ..... passim

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 24, 32, 39, 41

Kulko v. Superior Court of California,
436 U.S. 84 (1978) 23

Leroy v. Great Western United Corp.,
443 U.S. 173 (1979) 53, 54

Manigault v. Spring,
199 U.S. 473 (1905) 37

McGee v. International Life Ins. Co.,
355 U.S. 220 (1957) ..... passim

Mitchell v. Forsyth,
472 U.S. 511 (1985) 47

Olberding v. Ill. Cent. R. Co.,
346 U.S. 338 (1953) 52

Pennoyer v. Neff,
95 U.S. 714 (1878) 18

Richardson v. McKnight,
521 U.S. 399 (1997) 47

Rotella v. Wood,
528 U.S. 549 (2000) 56

Rush v. Savchuk,
444 U.S. 320 (1980) 34

Schwarzenegger v. Fred Martin Motor Co.,
374 F.3d 797 (9th Cir. 2004) 9, 11

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) ..... passim

Statutes

1 Stat. 79 (1789) 52
21 U.S.C. § 881(e)(1)(A) 2
28 U.S.C. § 1390(c) 58
28 U.S.C. § 1391(b)(2) ..... passim
28 U.S.C. § 1391(f) (1963) 17, 51, 53
28 U.S.C. § 1402(b) 51
28 U.S.C. § 1406 60
28 U.S.C. § 1441 58
28 U.S.C. § 1631 60
Pub. L. 89-714, 80 Stat. 1111 (1966) 51, 53

Rules

Fed. R. Civ. P. 4(k)(1)(A) 8, 38

Regulations

28 C.F.R. § 50.15 ..... 11, 13, 47

Other Authorities

ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) 54

H.R. Rep. No. 101-734 (1990) 54

Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009) 48

RESTATEMENT (SECOND) OF CONFLICTS OF LAW (1971) 37, 41

S. Rep. No. 89-1752 (1966) 53

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WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE (3d ed. 2007) 49

STATEMENT OF THE CASE

I. Factual Background

Respondents Gina Fiore and Keith Gipson are lawful professional gamblers who live and work in Las Vegas, Nevada. Pet. App. 2a; J.A. 13, 18. On occasion, they also travel to other locations as part of their profession to engage in legal gambling. In August 2006, respondents made such a trip to San Juan, Puerto Rico. They took with them a "traveling bank" of approximately $30,000. The trip was a success, as they won around $67,000. Pet. App. 3a.

On August 8, 2006, respondents arrived at the San Juan airport to fly home to Las Vegas, connecting through Atlanta. They carried with them the roughly $97,000 in cash. Pet. App. 3a. There is no legal restriction on traveling with that amount of cash on such a domestic flight.

Respondents' baggage was x-rayed and respondents themselves were screened through a machine that tests for even minute traces of drugs. Nothing was found. Respondents' carry-on baggage was also searched, revealing the significant quantities of cash but no evidence of drugs or any other unlawful activity. J.A. 16-17.

Respondents' possession of the cash triggered an inquiry by agents of the Drug Enforcement Administration (DEA), who questioned respondents about it. Respondents explained that they were professional gamblers, that the cash represented the proceeds of lawful gambling in a San Juan casino plus the "bank" they had brought with them, and that they were returning to their homes in Las Vegas. When asked for identification, respondents

produced California driver's licenses, but explained that they also had residences in Las Vegas. Pet. App. 4a; J.A. 18. They also provided the agents additional information concerning their Las Vegas residences. J.A. 18.

Having no basis to believe that respondents were engaged in any unlawful activity, the officials allowed respondents to board their flight. However, they told respondents that they might be subject to further questioning when they arrived in Las Vegas. Pet. App. 3a-4a. In response, respondents arranged to have their attorney meet them at the Las Vegas airport to be present during any further DEA questioning. *Id.* 4a.

However, rather than questioning petitioners at their home destination in the presence of their attorney, DEA agents intercepted respondents during their layover in Atlanta, where they would predictably lack access to counsel and where it would be costly and difficult for them to subsequently challenge the agents' conduct in a local court. One of those agents was petitioner Anthony Walden. At the time of the events in this case, he was working as both an officer in the Covington Police Department and as a deputized DEA agent in a joint state-federal drug task force assigned to the Atlanta Hartsfield-Jackson International Airport. *See* J.A. 39-40. Under such arrangements, local police departments are entitled to receive a share of money seized by their officers. 21 U.S.C. § 881(e)(1)(A); United States Drug Enforcement Administration, DEA Programs: State and Local Task Forces, http://www.justice.gov/dea/ops/taskforces.shtml (last visited July 23, 2013).

When respondents arrived in Atlanta for their connecting flight to Las Vegas, they spent some time in the terminal after disembarking from their flight from San Juan. Upon entering the gate line for boarding their Las Vegas flight, they were approached by petitioner and another DEA agent, who had been contacted by their San Juan counterparts. Pet. App 4a; J.A. 41. Petitioner and his partner questioned respondents separately. Fiore explained that she and Gipson were professional gamblers and that the cash was their bank and winnings. To demonstrate that respondents had acquired the funds lawfully, she produced a trip log (kept for tax purposes) itemizing her winnings in various casinos. Gipson likewise described the legitimate source of his cash, explaining that his documentation was in his checked luggage. Pet. App. 4a-5a.

After about ten minutes of questioning, another DEA agent arrived with a drug sniffing dog. It examined Fiore's bag without reaction. Pet. App. 5a. Petitioner and the dog handler indicated that this showed that the dog had not detected any contraband. J.A. 21. The dog pawed at Gipson's bag once but otherwise did not react to his luggage. *Id.*; Pet. App. 5a.

Petitioner nonetheless informed both Fiore and Gipson that the dog had alerted to their bags (even though the opposite was true at the very least with respect to Fiore's luggage). Moreover, the luggage had passed through screening in San Juan, and Fiore had provided petitioner with a log itemizing her casino winnings. Petitioner nonetheless asserted that there was probable cause to believe that all of

the cash was the proceeds of drug trafficking. On that purported basis alone, he seized all of their money. Respondents asked that they at least be left with cab fare to get home from the Las Vegas airport, but petitioner refused. Pet. App. 5a; J.A. 21.

Although he was seizing the money on the alleged premise that it was the result of drug trafficking, petitioner did not arrest respondents or even question them further. Indeed, no federal or state law enforcement agent *ever* questioned respondents again about any alleged illegal conduct, much less instituted criminal charges. Instead, having seized nearly $100,000 of respondents' money on the supposed ground that they had engaged in drug crimes, petitioner allowed respondents to board their flight, representing that their money would be returned if, after returning home, they could prove that it had been lawfully obtained. Pet. App. 5a. The case was then transferred to DEA headquarters in Virginia. Pet. App. 6a.

The events that followed are the basis for respondents' assertion that jurisdiction and venue are proper in federal district court in Nevada. Upon their return to Las Vegas, in accordance with petitioner's instructions, respondents and their counsel promptly assembled the requested documentation authenticating the legitimacy of the seized funds. On August 30, 2006, respondents forwarded to petitioner from Las Vegas copies of their federal tax returns showing that they made their living through gaming; receipts from their trip; travel itineraries; and hotel records from the casino in Puerto Rico. Shortly thereafter, on September 15, 2006, respondents' Las Vegas counsel sent petitioner

still more documents, including a report from a San Juan casino showing that Gipson won $30,000 shortly before boarding his flight from San Juan to Las Vegas. Pet. App. 5a-6a; J.A. 23-24.

In possession of these exculpatory materials, petitioner prepared and submitted a false probable cause affidavit to justify the seizure of the funds, with the goal of prompting the federal government to institute a forfeiture action. J.A. 25-27. In addition to falsely describing the events in the Atlanta airport, the affidavit concealed much, if not all, of the exculpatory evidence respondents had provided petitioner from Las Vegas. J.A. 26-27.

The review by the DEA Headquarters disclosed no evidence that the cash was connected to drug transactions. J.A. 25. Likewise, an investigation into respondents' backgrounds produced no evidence in support of the seizure. *Id.* Nonetheless, on the basis of petitioner's false probable cause affidavit, the DEA continued to retain the funds, denying respondents' request for it to be returned.

An Assistant United States Attorney eventually reviewed the case. She discovered, after speaking with respondents' counsel, that petitioner had concealed exculpatory information and submitted a misleading probable cause affidavit. Pet. App. 7a. After reviewing the evidence, she determined that there was no probable cause for the seizure or forfeiture of the funds. *Id.*; J.A. 35. The government then relented and returned the funds to respondents at their residences in Las Vegas, approximately six months after the initial seizure and petitioner's receipt of documentation showing the legitimacy of the funds. Pet. App. 7a.

During the period that the government refused to return the funds, respondents sought to continue their lawful gambling occupation in Las Vegas. But gambling requires cash, and the fact that respondents had no access to the money wrongly held by the government materially limited their ability to do so. J.A. 35; Pet. App. 27a.

II. Procedural History

A. District Court Proceedings

Respondents brought this *Bivens*[1] action against petitioner in the U.S. District Court for the District of Nevada. Respondents alleged that petitioner violated their Fourth Amendment rights by knowingly compiling a false and misleading probable cause affidavit after having received the exclupatory materials sent by respondents from Las Vegas. Pet. App. 7a-8a; J.A. 33, 35 (Complaint ¶¶ 102(iii), 110). The complaint alleges that as a result of these actions, respondents were deprived of access to their funds for approximately six months, causing them damage. J.A. 33-35.[2]

Petitioner was represented in the proceedings by the United States Department of Justice. He moved to dismiss the suit for lack of personal jurisdiction and improper venue. Pet. App. 8a. In support of his motion, he submitted an affidavit, J.A. 39-43, but he did not request an evidentiary hearing to resolve any

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Respondents also challenged the initial seizure of the funds. Pet. App. 7a; J.A. 33, 35 (Complaint ¶¶ 102(i), 110).

purported factual disputes, *see id.* 37-38; Pet. App. 11a & n.12. Petitioner stated that he was a resident of Georgia and had no material contacts with Nevada aside from the events giving rise to the litigation. J.A. 41-42. He acknowledged that at the time he seized respondents' cash he knew they were on their way to Las Vegas. *Id.* He did not deny that he was aware, based on communications from the San Juan DEA agents, that petitioners had explained that they were residents of both California and Nevada. *Id.* And he acknowledged having received the exculpatory documents from Las Vegas, without disputing the complaint's allegation that he failed to include that exculpatory information in his affidavit. *Id.* 43. Petitioner further did not deny preparing a knowingly false probable cause affidavit for the purpose of delaying or preventing the return of the seized cash to respondents in Las Vegas. *Id.* 39-43.[3]

The district court granted the motion, holding that it lacked personal jurisdiction over petitioner. Pet. App. 66a, 73a. The court did not reach petitioner's argument that venue was improper.

B. Court Of Appeals Decision

On respondents' appeal, petitioner was again represented by the federal government. The Ninth Circuit reversed, finding that the district court had personal jurisdiction over petitioner and that venue

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[3] Petitioner says in his brief to this Court that he "disputes drafting any affidavit at all." Petr. Br. 35. But he made no such claim in his affidavit. *See* J.A. 39-43. Nor did he make that claim in his briefs below or in his petition for certiorari.

was appropriate in the District of Nevada. Because petitioner did not ask for an evidentiary hearing, *see* Pet. App. 11a n.12, the court asked only whether respondents made a "prima facie showing of jurisdictional facts," taking as true the uncontroverted allegations and reasonable inferences drawn from the complaint while also resolving "all disputed facts in favor of the plaintiff." *Id.* 12a (citation and internal quotation marks omitted), 14a. Petitioner does not challenge that framework in this Court.

1. The court of appeals explained that although respondents brought federal claims in federal court, under Federal Rule of Civil Procedure 4(k)(1)(A), personal jurisdiction was governed by the forum state's long-arm statute. Pet. App. 9a. Because Nevada's statute permits personal jurisdiction to the full scope permitted by the Due Process Clause of the Fourteenth Amendment, the court's analysis "focuse[d] exclusively on due process considerations." *Id.*

The court applied the circuit's settled three-part test:

> (1) The non-resident defendant must *purposefully direct his activities* or consummate some transaction *with the forum or resident thereof*; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

> (2) the claim must be one which arises out of or relates to the defendant's *forum-related activities*; and
>
> (3) the *exercise of jurisdiction* must comport with fair play and substantial justice, i.e. it *must be reasonable*.

Pet. App. 10a (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)) (emphasis in original).

Purposeful Direction. The first prong of the inquiry, the court explained, can take two forms based on the type of case: "purposeful direction, which most often applies in tort cases, and purposeful availment, which most often applies in contract cases." Pet. App. 15a. Because respondents alleged intentional torts, the court applied a "purposeful direction analysis," derived from this Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984) . Pet. App. 15a-16a. Under that test, "the defendant allegedly must have [(a)] committed an intentional act, [(b)] expressly aimed at the forum state, [(c)] causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* 16a (citation and internal quotation marks omitted).

In this case, the first requirement was satisfied because the complaint alleged intentional torts. Pet. App. 17a. Moreover, the court easily concluded that the third prong was satisfied as well: petitioner knew that "delay in returning the funds to Fiore and Gipson in Las Vegas caused them foreseeable harm in Nevada," because he was aware that the funds constituted working capital for their professional gaming activities there. *Id.* 28a.

Accordingly, the key question was whether petitioner had expressly aimed his conduct at Nevada within the meaning of *Calder*. Pet. App. 17a. The court of appeals accepted, for purposes of its decision, the district court's conclusion that the *initial* seizure of the funds did not meet this test. But the court of appeals recognized that respondents' complaint is not so limited. Instead, respondents separately allege that petitioner attempted to prevent the return of the funds to respondents in Nevada through his false affidavit. The court concluded that the express aiming prong was satisfied with respect to that allegation. *Id.*

The court explained that "[i]n general, where there was 'individual targeting' of forum residents – actions taken outside the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections — we have held the express aiming requirement satisfied." *Id.* 17a-18a (citations omitted). For example, "if a defendant is alleged to have defrauded or similarly schemed against someone with substantial ties to a forum, the 'expressly aimed' factor is met, even if all the defrauding activities occur outside the forum." Pet. App. 25a. This case was similar to such a fraud case, the court explained, in that petitioner "fraudulently executed a false and misleading probable cause affidavit, used it to encourage the U.S. Attorney in Georgia to prosecute a forfeiture action, and thereby sought to obtain the funds for the Atlanta DEA." Pet. App. 26a.

The court of appeals further concluded that respondents' claims arose from petitioner's forum-related conduct and that exercise of jurisdiction was

reasonable in this case, as required by the second and third prongs of the circuit's *Schwarzenegger* test. Pet. App. 29a-36a. In assessing reasonableness, the court considered, among other things, petitioner's role as a law enforcement officer in a busy international airport. *Id.* 31a-33a. The court acknowledged that by virtue of his job, petitioner was potentially subject to accusations of illegal conduct by individuals from throughout the country. "Were Walden a local small business person or an airport employee," the court concluded, "his argument might well have force." *Id.* 32a. But the litigation burden on a federal agent like petitioner, the court noted, is substantially diminished because when "federal employees are sued under *Bivens*, the government, as a rule, provides for their defense, and, ultimately, indemnifies them." Pet. App. 32a (citing 28 C.F.R. § 50.15). And in this case, petitioner was "represented by the appellate staff of the Civil Division of the Department of Justice in Washington, D.C." *Id.* 33a. Conversely, the burden of having to litigate their claim in Georgia would be significant for respondents. *Id.*

The court ended its due process analysis by emphasizing the limits of its decision. "[W]e are not holding," the court explained, "that intentional tortious conduct aimed at a person where he or she is in transit at an airport is sufficient, standing alone, to confer personal jurisdiction over an airport-connected official or employee." Pet. App. 37a. In this case, petitioner "did much more" because "his actions amounted to an attempt to defraud Nevada residents." *Id.*

Having concluded that the district court had personal jurisdiction over petitioner with respect to the false affidavit claim, the court left open for the district court to decide on remand whether to exercise pendent personal jurisdiction over respondents' remaining claims, including their distinct claim that petitioner's initial seizure of the cash was unconstitutional. Pet. App. 38a-39a.

2. The court also rejected petitioner's alternative claim that venue in the District of Nevada was improper. Pet. App. 40a-42a.

The court explained that venue lies in any district in which "a substantial part of the events or omissions giving rise to the claim occurred." Pet. App. 40a (quoting 28 U.S.C. § 1391(b)(2)). "In a tort action," the court continued, "the locus of the injury is a relevant factor in making this determination." *Id.* 41a (citation and internal punctuation omitted). And in this case, "[a]ll the economic injuries suffered by [respondents] were realized in Nevada." *Id.*

The court considered other factors as well. It noted that respondents' $30,000 "bank" had originated in Nevada; that petitioner's fraudulent probable cause affidavit was designed "to institute forfeiture proceedings against [respondents] after they had returned to their residences in Nevada"; and that the case became ripe only when respondents' funds were returned to Nevada. *Id.* 41a-42a.

"Taking all these events together," the court held that "'a substantial part of the events or omissions giving rise to the claim occurred'" in Nevada. Pet. App. 42a (quoting 28 U.S.C. § 1391(b)(2)).

The court emphasized that it was not holding that "law enforcement officers who work at transportation hubs are subject to nationwide venue because of their status." *Id.* 41a. "For venue to lie, the terms of § 1391(b)(2) must be met, as they are in this case." *Id.*

3. Judge Ikuta dissented, principally on the factual ground that she did not read respondents' complaint to allege a distinct false affidavit claim. *See* Pet. App. 54a-59a. She did not, however, question the majority's venue analysis.

4. Petitioner sought rehearing and rehearing en banc. The federal government declined to have its attorneys participate in further appellate review, but presumably agreed to pay fees for his private counsel. *See* 28 C.F.R. § 50.15.

The full court denied the petition. Pet. App. 765a. The Judges O'Scannlain and McKeown wrote dissents, again limited to the panel's personal jurisdiction ruling. Pet. App. 77a-95a.

In response, the members of the original panel majority added a postscript to their opinion, setting forth in greater detail the basis for their reading of the complaint to include a separate false affidavit claim. Pet. App. 43a-47a. They further emphasized that "where a defendant's actions have only an indirect or unintended impact on forum-resident plaintiffs, even where a defendant knows of a plaintiff's forum-residence and could foresee such an impact, the express-aiming requirement is not satisfied." *Id.* 46a. But in this case, the "complaint alleges not that Walden inadvertently filed a false affidavit, but rather that he intentionally filed an

affidavit he *knew* was false – allegations analogous to fraud." *Id.* And "caselaw firmly establishes that fraud directed at harming a *particular* person in a forum meets the express aiming standard." *Id.* 47a.

5. The United States declined to file a petition for certiorari on petitioner's behalf. However, petitioner's private counsel did, and this Court granted certiorari on March 4, 2013. 133 S. Ct. 1493.

SUMMARY OF THE ARGUMENT

I. The court of appeals correctly held that petitioner established constitutionally sufficient minimum contacts with Nevada by intentionally targeting respondents to suffer an injury in that state.

In *Calder v. Jones*, 465 U.S. 783 (1984), this Court unanimously upheld California's exercise of personal jurisdiction over Florida defendants whose only contact with the forum was their authorship of an article that defamed a California resident. "We hold," the Court announced, "that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California." *Id.* at 791.

Calder establishes that a defendant creates sufficient minimum contacts with a forum when he (1) intentionally targets (2) a known resident of the forum (3) for imposition of an injury (4) to be suffered by the plaintiff while she is residing in the forum state. Thus, a police officer who subjects a Nevada resident to an unlawful search in the Atlanta airport is not subject to suit in Nevada even if he knows the victim's home state. The defendant's conduct must be "calculated to cause injury to [the plaintiff] *in*" the

forum state. 465 U.S. at 791 (emphasis added). And the invasion of privacy that constitutes the constitutional injury in an unlawful search case is experienced at the time and place of the search.

In some cases, however, a defendant's actions and the resulting injury take place in different states. *Calder* is one example, but modern technology has given rise to many others. A defendant passing through the Atlanta airport can order items online using stolen credit card information from a victim in Vermont. A defendant in Florida can fraudulently access the bank account of a victim in California. Or a defendant might file a false change of address form with the Social Security Administration, redirecting a Connecticut resident's disability payments to himself in New Jersey.

In such cases, where there is no obvious physical location at which the illegal conduct and injury simultaneously occur, the injury is properly seen as occurring in the state where the victim resides, just as this Court concluded that the emotional and reputational injuries in *Calder* occurred in California because that was where the victim lived and worked. And under *Calder*, a defendant who intentionally targets a victim to suffer such an injury thereby establishes constitutionally sufficient minimum contacts with the state in which the injury occurs.

Petitioner's contrary reading of *Calder* cannot be squared with the text or rationale of that opinion. Although the Court mentions in one place that the defendant's actions were "aimed at California," 465 U.S. at 789, the Court made clear that all this meant was that the defendants wrote "an article that they knew would have a potentially devastating impact

upon respondent" and "knew that the brunt of that injury would be felt by respondent in the State in which she lives and works." *Id.*

The court of appeals' reading of *Calder* fully comports with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There is nothing remotely unfair in a state allowing its courts to remedy an injury a defendant intentionally inflicted in the forum.

The decision of the court of appeals also is consistent with principles of state sovereignty and federalism. Protecting state residents from intentional harm is a core sovereign obligation. Providing a judicial forum for injuries intentionally imposed within the state does not offend the sovereignty of the state in which the defendant acted, particularly when, as here, the forum state acts to enforce *federal* law.

Petitioner complains that such a rule creates practical problems for law enforcement. But the court of appeals properly considered those objections as part of the second-stage reasonableness analysis that follows a finding of minimum contacts, a portion of the decision petitioner has chosen not to challenge in this Court. In any event, law enforcement officials are already provided significant special protection by the doctrine of qualified immunity and by the general provision of representation and indemnification by their employers. At the same time, there are powerful countervailing interests in affording victims of police abuses access to convenient fora for the redress of constitutional violations.

II. Nor is there any basis in the language, history, or purposes of 28 U.S.C. § 1391(b)(2) for petitioner's claim that venue was limited in this case to the district in which the defendant's actions occurred, thereby precluding venue in the place of injury.

In amending Section 1391(b)(2) to its present form, Congress specifically rejected the model of prior provisions that allowed venue in "the judicial district wherein the act or omission complained of occurred." 28 U.S.C. § 1391(f) (1963). Instead, Congress allowed venue in any district in which a substantial portion of the "events" or "omissions" that "give rise" to the claim transpired. That language is broad enough to encompass the district in which the plaintiff experiences the injury (an "event") that forms a necessary element of her claim (*i.e.*, "gives rise to the claim").

That reading is confirmed by the history of the statute, which has been repeatedly amended to expand venue and allow courts to weigh a wider range of practical considerations. The Court has emphasized that even under an earlier, narrower version of the provision, courts could consider the availability of evidence and the convenience of witnesses, not just the location of the defendant's acts or omissions. In many cases, those considerations point away from the place of the defendant's conduct and toward the district in which the injury occurred. For example, the defendant's home forum may have almost nothing to do with a case in which a life insurance company denies a claim on the ground that the decedent committed suicide.

Nor is there any reason to believe that Congress intended the venue provision to render federal courts substantially less open to victims of targeted intentional torts than are the state courts. Yet on petitioner's theory, the plaintiff in *Calder* could not have filed her suit in federal court because all of the defendant's acts took place in Florida; indeed, the defendants could have removed the case to federal court in California and then demanded transfer to Florida as the only district in which federal venue would lie.

ARGUMENT

Petitioner is charged with submitting a false probable cause affidavit for the purpose of preventing the federal government from returning to respondents money that was rightfully theirs. At the time he wrote the affidavit, petitioner knew respondents were living and working in Las Vegas, Nevada. And he knew that the financial injury from his unlawful conduct would be visited upon them there. There appears to be no dispute that if petitioner had written his affidavit from a hotel room in Las Vegas, jurisdiction and venue in the District of Nevada would be proper in this case. The question is whether it makes a determinative difference that he instead submitted the affidavit from his home state of Georgia.

One hundred and fifty years ago, the answer would have been clear. At that time, it was commonly accepted that a court had no jurisdiction over persons outside its territorial jurisdiction. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878). But the "limits imposed on state jurisdiction by the Due

Process Clause . . . have been substantially relaxed over the years" in light of "a fundamental transformation in the American economy." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (citations omitted). "As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase." *Id.* at 294 (quoting *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958)).

Nowhere is that need clearer than in cases of intentional torts. Increasingly, modern technology allows defendants to impose grave harm on a state's residents without ever setting foot in the state. A defendant sitting in an airport in Illinois with nothing more than a laptop and an Internet connection can use the stolen identity information of a victim in Vermont to make online purchases from a company in California using a debit card issued to the victim by a bank in Delaware. If states are to fulfill their most basic sovereign function of protecting their residents from such intentional harm, their legislatures must be afforded leeway to bestow upon their courts long-arm jurisdiction sufficient to meet the modern threat.

That said, this case may be resolved within the confines of this Court's existing precedents. The court of appeals properly concluded that nothing in the Due Process Clause precludes Nevada from providing a forum for its residents when they are intentionally targeted by an out-of-state defendant for injury within the forum. Nor does the federal venue provision strip the district court in Nevada of

the authority to hear such a claim simply because the defendant acted in another state.

I. Petitioner Established "Minimum Contacts" With Nevada By Intentionally Targeting Respondents For Injury In Las Vegas.

Petitioner's objections to the court of appeals' personal jurisdiction ruling are quite narrow and easily resolved.

Petitioner does not challenge the Ninth Circuit's basic three-part framework for determining personal jurisdiction, which asks (1) whether the defendant has sufficient "minimum contacts" with the forum; (2) whether the suit arises out of those contacts; and (3) whether the exercise of jurisdiction is reasonable on the facts of this case. Pet. App. 10a.[4]

Petitioner furthermore challenges the court of appeals' resolution of only the first step of the test, addressing "minimum contacts." He does not seek review of (indeed he barely acknowledges) the court's reasonableness ruling. *See* Petr. Br. 7 (stating only that the "court of appeals then found the other requirements of due process satisfied").

Petitioner further does not seek review of the Ninth Circuit's decision to base its personal jurisdiction ruling solely on respondents' false affidavit claim, leaving it to the district court to decide on remand whether to exercise pendant

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[4] That test is firmly founded in this Court's precedents. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 475 (1985).

personal jurisdiction over their separate unlawful seizure claim. *See* Pet. App. 38a-39a.[5]

And in contesting personal jurisdiction over the false affidavit claim, petitioner does not ask this Court to resolve any of the various factual disputes between the parties. *See* Pet. Cert. Reply 11 (asserting that "the dispute here is purely legal and could not be more cleanly presented"). Thus, although he asserts in a footnote that he "did not know that respondents were Nevada *residents*," petitioner disavows any reliance on that alleged fact. Petr. Br. 23 n.5.[6] Nor does he dispute the court of appeals' reading of the record as establishing that he knew that respondents would suffer the financial injury caused by his conduct where they were residing and working, in Nevada. *See* Pet. App. 28a, 31a-32a.

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[5] Thus, petitioner does not contest the court's reading of respondents' complaint as containing separate unlawful seizure and false affidavit claims. *See* Petr. Br. 4 n.3. Nor does he ask this Court to decide whether those allegations state a claim.

[6] There is no basis for that claim in the record. In his affidavit in support of his motion to dismiss, petitioner carefully stated only that at the time of the initial encounter, when asked for identification, respondents "provided state issued driver's licenses, which were not issued by the State of Nevada." J.A. 42. He said nothing about what his colleagues in San Juan told him about respondents' residence, and does not dispute that respondents told those officers they were Nevada residents. *See id.* 41-42. Nor does his affidavit say anything about what petitioner learned about respondents' place of residence later on, through subsequent investigation into their backgrounds or communications with their Las Vegas counsel. *See id.* 23-25, 43.

Accordingly, as presented to this Court, the question presented boils down to this: does a defendant establish constitutionally sufficient minimum contacts with a forum when he intentionally targets known forum residents to inflict an injury that he knows will be suffered in that forum?

Importantly, the question for this Court is not whether such a rule is wise or even fair. The Constitution gives the power and responsibility for crafting personal jurisdiction rules first and foremost to Congress and state legislatures. Instead, the question for the Court is whether permitting an exercise of personal jurisdiction in such circumstances would so far exceed "traditional notions of fair play and substantial justice" that it is beyond the power of the people's elected representatives to permit. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

A. Petitioner's Actions Established Minimum Contacts With Nevada Under *Calder v. Jones*.

The court of appeals correctly applied this Court's precedents to find that petitioner's intentional targeting of respondents for financial injury in Nevada established the minimum contacts required by the Due Process Clause.

1. *This Court's Due Process Cases Draw A Fundamental Distinction Between Intentional Torts Against Targeted Victims And "Mere Untargeted Negligence."*

"[T]he 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application." *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978). It depends, instead, "upon the quality and nature of the activity" undertaken by the defendant. *International Shoe*, 326 U.S. at 319. Of particular importance to this case, the Court has carefully distinguished intentional torts that target known victims, like the ones alleged here, from other negligent acts that are typical of, for example, product liability claims.

When a defendant has not targeted anyone for injury, but instead has simply created a product with the potential to injure unknown individuals wherever the product is eventually used, the "general rule" is that a defendant may be sued in the victim's home forum only if it has "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (plurality) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). That requirement is driven by the economic reality that once placed into the stream of commerce, a product may eventually find its way to far-flung places, and by the Court's determination that subjecting defendants to suit anywhere their products cause injury would create intolerable uncertainty and

burdens. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980).

Consequently, in such cases, the mere fact that an injury occurred in a forum is not enough; the court must look to other contacts with the state, such as the defendant's choice to regularly market or sell its products there. *World-Wide Volkswagen*, 444 U.S. at 297-98. When a defendant's contacts with the state are the result of its own purposeful decisions, rather than solely the choices of the plaintiff or random events, jurisdiction is appropriate because the defendant is assured a measure of predictability and control over its own amenability to suit in that forum. *Id.* at 297.

Cases like this one, alleging an intentional tort against a targeted victim, are quite different. *See, e.g.*, *Calder v. Jones*, 465 U.S. 783, 789 (1984) (distinguishing intentional torts from "mere untargeted negligence"); *see also Nicastro*, 131 S. Ct. at 2785 (plurality) (noting that "there may be exceptions" to the "general rule" requiring purposeful availment, "say, for instance, in cases involving an intentional tort.") (citation omitted).

In cases involving intentional torts against targeted victims, the Court has held that "a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents." *Burger King*, 471 U.S. at 473. The Court has recognized that states have "a significant interest in redressing injuries that actually occur within the State," *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984), even when the defendants have not physically entered the jurisdiction. *See, e.g.*, *McGee v. International Life*

Ins. Co., 355 U.S. 220, 223-24 (1957). At the same time, in the intentional tort context, the scope of defendants' exposure to suit in other states is limited, predictable, and largely within their own control – they are subject to suit only in those states in which they target a forum resident, not every jurisdiction into which their products may eventually flow.

Accordingly, in the products liability context, the analysis focuses on whether a defendant "can be said to have targeted *the forum*," in the sense of "'seek[ing] to serve' a given State's market." *Nicastro*, 131 S.Ct. at 2788 (plurality) (emphasis added) (citation omitted). By contrast, in an intentional tort case like this one, the question is whether the defendant has targeted "*residents* of the forum" for injury in that state. *Burger King*, 471 U.S. at 472 (emphasis added).

2. Under Calder v. Jones, *A Defendant Establishes Sufficient Minimum Contacts With A Forum When He Intentionally Targets The Plaintiff For Injury In That Forum.*

a. This Court's principal intentional targeting case is *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, actress Shirley Jones filed suit in California against a writer and editor of the *National Enquirer*, both of whom lived and worked in Florida. She alleged that the two defendants had collaborated in producing an article that defamed the actress, causing her reputational injury and emotional distress. *Id.* at 784, 789.

This Court accepted that the defendants had no meaningful contacts with California other than the

article. Further, the Court agreed that the tabloid's general contacts with California, through the distribution of the *Enquirer* in the state, could not be attributed to the defendant-employees for purposes of asserting personal jurisdiction against them individually. 465 U.S. at 790.

The Court nonetheless unanimously upheld the exercise of personal jurisdiction over the individual defendants in California. In an intentional tort case, the Court explained, a defendant may establish the requisite minimum contacts with a forum by making a forum resident "the focus of the activities of the defendants out of which the suit arises." 465 U.S. at 789. Thus, in *Calder*, the defendants' "intentional, allegedly tortious, actions were expressly aimed at California," in the particular sense that the defendants knew that their article "would have a potentially devastating impact upon" Jones and "knew that the brunt of the injury would be felt by [Jones] in the state where she lives and works and in which the *National Enquirer* has its largest circulation." *Id.* at 789-90. "An individual injured in California," the Court held, "need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.* at 790.

The Court concluded by stating its holding: "We hold that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California." 465 U.S. at 791.

b. *Calder* thus establishes that a defendant creates sufficient minimum contacts with a forum when he (1) intentionally targets (2) a known

resident of the forum (3) for imposition of an injury (4) to be suffered by the plaintiff while she is residing in the forum state.

Under this standard, it is not enough that the defendant injured a person who turns out to be a resident of another state. The defendant must specifically target the victim, knowing that his victim is a resident of the forum. In addition, the defendant's conduct must be "calculated to cause injury to [the plaintiff] *in*" the forum state. *Calder*, 465 U.S. at 791 (emphasis added). Injuries that occur elsewhere are not the basis for jurisdiction in the victim's home state under *Calder*.

A hypothetical illustrates the rule's operation. A Nevada resident who asserts that officers in the Atlanta airport violated the Fourth Amendment by subjecting him to heightened security screening cannot, without more, file suit in his home state. That is so even if the officers knew from his driver's license that he was a Nevadan. *Contra* Petr. Br. 36. Similarly, a Nevada resident unlawfully beaten by officers in the Atlanta airport cannot return home to file suit. In both cases, the injury – the privacy intrusion and the physical harm – occurred in Georgia, not Nevada. *Calder* permits suit to be filed in Nevada only if the *injury itself* occurs in that forum. The fact that the injury has collateral consequences that may be felt later and in other places does not suffice. *Cf. Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (distinguishing, for statute of limitations purposes, between time when unlawful act occurs and subsequent times when "the *effects* of the" violation are felt) (emphasis in original).

In contrast, when a defendant inflicts injuries remotely – for example, by using a stolen credit card in another state, publishing a defamatory story in a national tabloid, or submitting a false affidavit designed to prevent the victim from receiving a payment from the government – the place of the unlawful conduct and the place of injury are necessarily distinct. As in *Calder*, the defendant may act in Florida, intending that the victim experience the "brunt of that injury . . . in the State in which she lives and works." 465 U.S. at 789-90. And in such circumstances, by that voluntary, intentional act, he establishes constitutionally sufficient minimum contacts with that forum.

c. Petitioner reads *Calder* differently. He insists that "plaintiff may not hale an out-of-state defendant into court based on an intentional tort unless the defendant's alleged conduct was *expressly aimed at the forum state*—a requirement that is separate from and in addition to the requirement that the defendant know he will cause harm in the forum state." Petr. Br. 22 (emphasis added).

Preliminarily, petitioner never provides a satisfactory explanation of what it means to target a state, as opposed to its residents, for an intentional tort (other than to suggest, unhelpfully, that shooting a gun into the state's territory would count, Petr. Br. 33). But whatever it means, his proposed rule cannot be squared with this Court's precedents.

The Court in *Calder* repeatedly made clear that due process is satisfied by targeting a known state *resident* for injury in the forum. The Court expressly stated that "[w]e hold that jurisdiction over petitioners in California is proper *because* of their

intentional conduct in Florida calculated to cause injury *to respondent* in California." 465 U.S. at 790 (emphasis added). The Court explained that "[i]n this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California *resident*, and jurisdiction over them is proper on *that basis*." 465 U.S. at 791 (emphasis added). The Court thus affirmed the lower court's holding that "a valid basis for jurisdiction existed on the theory that petitioners intended to, and did, cause tortious *injury to respondent* in California." *Id.* at 787 (emphasis added).

Likewise, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Court cited *Calder* as establishing the principle that "[w]here a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [the due process] 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at *residents of the forum*." 471 U.S. at 472-73 (emphasis added). The Court explained that so long as the defendant's "efforts are 'purposefully directed' *toward residents* of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.* at 476 (citing *Calder*, 465 U.S. at 778-790) (emphasis added). In this context, the Court explained, considerations of "fair play and substantial justice" serve to "establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*, 471 U.S. at 477 (citing, among other cases, *Calder*, 465 U.S. at 788-89).

Petitioner nonetheless points to a sentence in *Calder* that observes that the defendants' "intentional, and allegedly tortious, actions were expressly aimed *at California*." 465 U.S. at 789 (emphasis added). But in the very next sentences, the Court made clear that it was making no distinction between targeting a California resident for injury in that state (by far the predominant articulation of the rule throughout the opinion) and targeting California. The Court explained that the defendants targeted California by writing and editing "an article that they knew would have a potentially devastating impact *upon respondent*. And they knew that the brunt of that injury would be *felt by respondent* in the State in which she lives and works and in which the *National Enquirer* has its largest circulation." *Id.* at 789-90 (emphasis added). In the next sentence, the Court makes clear that it was "th[ose] circumstances" that made it reasonable for the defendants to "anticipate being haled into court" in the jurisdiction in which the harm was intentionally imposed. *Id.* at 790.

Petitioner also relies on sentences in the opinion describing how "the defamatory article was 'drawn from California sources' and concerned the plaintiff's 'California activities'; and that the plaintiff's 'career was centered in California.'" Petr. Br. 23 (quoting *Calder*, 465 U.S. at 789). He further points out that the Court noted that "California [was] the focal point *both of the story and of the harm suffered*," Petr. Br. 24 (quoting *Calder*, 465 U.S. at 789) (emphasis added by petitioner). "If targeting of a known forum resident were all that due process required," he

reasons, "most of these facts would have been irrelevant." *Id.*

That argument fails at multiple levels. As an initial matter, there is no need to scour the opinion for clues about which facts were ultimately essential to the result or what legal rule the Court adopted: Justice Rehnquist made both clear through the unambiguous articulation of the holding, which turned on the state in which the victim was targeted for injury, rather than the content of the defamatory story or the location of its sources. 465 U.S. at 791 ("We hold that jurisdiction over petitioners in California is proper *because of their intentional conduct in Florida calculated to cause injury to respondent in California.*") (emphasis added).

The Court made the same point at the end of the paragraph petitioner quotes. After noting that the story concerned California activities and was drawn from California sources, the Court explained that "[j]urisdiction over petitioners is therefore proper in California based on the '*effects*' of their Florida conduct in California," 465 U.S. at 789 (citations omitted) (emphasis added), not based on the subject matter or sources of the story that caused those effects. Those subsidiary facts simply explain why the effects of the defendants' conduct were felt in California, where Jones worked and her reputation mattered the most. For example, the fact that the *Enquirer* was circulated in California and discussed Jones's acting in Hollywood explains why the

defamatory article caused injury to her reputation in that state.[7]

Moreover, petitioner identifies no reason founded in the concerns of the Due Process Clause why the facts he cites should be sufficient to turn an otherwise unconstitutional exercise of jurisdiction into a lawful one. If it is fundamentally unfair to hale a Florida defendant into a California court solely because he targeted a California resident for defamation, how does that same exercise of power suddenly become consistent with traditional notions of justice and fair play when the story happens to involve events in California or is based in part on California sources? How could the fact that an article mentions California activities, or was based on phone calls to that state, tip the scales in giving California "the power to subject the defendant to judgment" for their defamatory conduct? *Nicastro*, 131 S. Ct. at 2789 (plurality). Petitioner offers no answers.

In fact, it is respondents' interpretation of *Calder*, not petitioner's, that best reflects the underlying principles of fairness and federalism that have guided this Court's due process decisions.

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[7] Notably, the Court accepted the defendants' argument that the circulation of copies of the tabloid in California could not count as a contact between the defendants (who, as mere employees of the paper, did not control its circulation) and the forum. 465 U.S. at 790. Had the Court concluded otherwise, personal jurisdiction would have been established without further analysis. *See Keeton*, 465 U.S. at 773-74 ("[R]egular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction" against the publisher in a libel action).

3. *There Is Nothing Unfair About A State Exercising Jurisdiction Over A Defendant Who Intentionally Targets State Residents For Injury In The Forum.*

When a defendant intentionally targets a particular individual to suffer injury in a specific state, there is nothing inconsistent with "traditional notions of fair play and substantial justice," *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted), in allowing that state to provide a forum for the injured victim. Unlike a company whose product causes an unintended injury to an unknown victim, a defendant who "'purposefully directs' his activities toward forum residents," *Burger King*, 471 U.S. at 473, to inflict an injury upon them in that state can claim no unfair surprise that he may be held to account in that forum. *See Calder*, 465 U.S. at 190.

This is so even if the defendant inflicts the injury without physically entering the state. Modern technology is increasingly empowering out-of-state defendants to target a state's residents for injury without ever having to set foot in the state. A defendant can fraudulently access the retirement account of a victim in California over the Internet without ever leaving his home in Florida. A defendant in Rhode Island can stalk or harass a victim in South Carolina through text messages or Facebook postings without ever crossing the Mason-Dixon Line.

While the Internet and electronic communications have greatly enhanced defendants' power to act from afar, the problem for states is not

limited to that context. For example, an Alabama resident can mail a claim to a New York insurance company, causing it to send her a payment that was actually due to a California resident. A defendant can file a false change-of-address form for a Social Security recipient in Connecticut, redirecting the monthly benefits to himself in New Jersey. Or a debt collector in Kansas might submit fraudulent garnishment papers to an employer's main offices in Wisconsin, causing a reduction in wages a worker otherwise would receive in Iowa.

In all of these examples, the location of the defendant's conduct is ultimately less important to considerations of fundamental fairness than is the voluntariness of his decision to inflict an injury in the forum and his knowledge that the injury will be suffered there. Thus, the defendant who steals the retirement savings of a couple he knows to reside in California is fairly called to account in the courts of that state, whether he physically breaks into their bank in Sacramento or hacks into the bank's computers from Tallahassee. Likewise, a defendant like petitioner may fairly be sued in Nevada when he unlawfully attempts to prevent the return of funds to known Nevada residents whether he accomplishes that objective by writing a false affidavit in Atlanta, by writing the same affidavit from a hotel in Reno, or by stealing the refund check from petitioners' mailboxes in Las Vegas.

Acknowledging that reality does not make "*the plaintiff's* contacts with the forum . . . decisive in determining whether the defendant's due process rights are violated." Petr. Br. 25 (quoting *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (emphasis added

by petitioner)). The plaintiff's connection with the forum is insufficient unless the defendant voluntarily and intentionally targets the plaintiff to suffer an injury there.

Nor does the decision below contravene any constitutional principle that foreseeability alone is an insufficient basis for jurisdiction. *Contra* Petr. Br. 26-27. The line of cases upon which petitioner relies involves the kind of untargeted negligence that has the potential to give rise to claims nearly anywhere. *See id.* That risk, however, does not arise in cases of intentional torts targeted at known forum residents. Here, the effect in Nevada was not simply a foreseeable possibility; it was an *intended* effect of petitioner's conduct. That distinction was determinative in *Calder*, in which the Court rejected a similar argument that it was violating due process by holding the writer of the defamatory article subject to jurisdiction in California only because it was foreseeable that the article would be circulated, and cause injury, there. *See* 465 U.S. at 789-90. It was enough, the Court held, that the defendant engaged in "intentional conduct" that was "calculated to cause injury to [the plaintiff] in California." *Id.* at 791.

To be sure, as petitioner notes, permitting jurisdiction in such cases will sometimes impose litigation burdens on defendants who ultimately prevail on the merits. Petr. Br. 35. But *all* personal jurisdiction rules have that potential. Petitioner asserts that jurisdictional facts are more likely to be contested in intentional tort cases because they may overlap with the merits. Petr. Br. 34-35. But it is not self-evident that this is so. In *Calder*, for example,

the material jurisdictional facts were undisputed. *See* 465 U.S. at 785 n.3. Likewise in the context of this case, an officer might well concede that he wrote an affidavit in an attempt to prevent the return of funds to the plaintiff known to reside in the forum state, while still arguing (like the defendants in *Calder*) that what he wrote was true. At the same time, factual disputes can arise under the rule proposed by petitioner (*e.g.*, over the existence, nature, or extent of the defendant's other contacts with the forum).

The unfairness of subjecting potentially innocent defendants to litigation in out-of-state fora cannot be avoided, but it is mitigated by requiring courts to decide jurisdictional questions early in the case and by allowing defendants to request an evidentiary hearing to resolve any relevant factual issues, even if they overlap with the merits. In this case, however, petitioner never asked for a hearing. Pet. App. 11a n.12. Indeed, thus far, petitioner has not denied the allegations in the complaint and does not contest that the United States Attorney's office, on an independent review of the evidence, determined that there was no basis for the seizure or forfeiture of respondents' funds. *See* Pet. App. 7a; J.A. 35, 42; Petr. Br. 3-4.

At the same time, finding that a defendant has sufficient minimum contacts with a forum does not end the due process fairness analysis; the court must go on to consider whether the exercise of jurisdiction is reasonable in light of the specific circumstances of the case before it. *See, e.g.*, Pet. App. 30a; *Burger King*, 471 U.S. at 477. But again, petitioner has not

asked this Court to review the court of appeals' reasonableness determination in this case.

4. *Respect For State Sovereignty Requires That Each State Be Allowed To Exercise Jurisdiction Over Those Who Target Its Residents For Injury Within The State.*

Nor is respondents' position "irreconcil[able] with the basic notions of the territorial limits on state judicial power." Petr. Br. 31-32 (citing *Nicastro* plurality decision).

Petitioner's conduct directly implicated Nevada's most basic sovereign responsibility to protect those within its borders. *See, e.g.*, *Manigault v. Spring*, 199 U.S. 473, 480 (1905) (noting the "sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people"); RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 37 cmt. a ("A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere"); *McGee*, 355 U.S. at 223 (same). Tortious conduct causing an injury within a state also affects that state's broader interests in protecting its economy and other institutions from the adverse effects of the tort. In this case, for example, petitioner's actions substantially diminished respondents' ability to actively participate in their profession in Las Vegas while the return of their money was delayed.

Accordingly, a defendant who targets a state resident, intending to cause that person to suffer an injury in the state, unquestionably engages in a "course of conduct directed at the society or economy existing within the jurisdiction . . . so that the

sovereign has the power to subject the defendant to judgment concerning that conduct." *Nicastro*, 131 S. Ct. at 2789 (plurality).

Nor does Nevada's exercise of jurisdiction in a case like this "reach out beyond the limits imposed on [it] by [its] status as [a] coequal sovereign[] in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. When a defendant intentionally causes an injury in another state, the state of injury has at least as great a claim to remedy the harm as the state in which the defendant acted. *See Calder*, 465 U.S. at 790; *McGee*, 355 U.S. at 223.

This is particularly true in a case, like this one, that raises only *federal* claims. As the plurality in *Nicastro* explained, "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." 131 S. Ct. at 2789. When a federal claim is heard in state court – and even more so, when it is heard in federal court, albeit pursuant to the personal jurisdiction rules of the courts of the state in which it sits, *see* Fed. R. Civ. P. 4(k)(1) – the court acts to vindicate the authority of the federal government, not the territorially more limited power of the state. The adjudication of a *federal* claim in a *federal* court in Nevada poses no threat to the federal structure or any offense to the sovereignty of the state of Georgia. Accordingly, petitioner rightly conceded below that "there is no state sovereignty conflict at issue" in this case. Petr. C.A. Br. 24.[8]

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[8] Petitioner's position furthermore disregards states' "substantial interest in cooperating with other states . . . to provide a forum for efficiently litigating all issues and damages

b. Petitioner ultimately acknowledges that "States certainly have authority to punish some intentional torts committed by out-of-state defendants." Petr. Br. 32. He even admits that this authority extends to harmful conduct initiated outside the state's territorial boarders. *Id.* 33. He posits, however, that a state may protect its residents only when the defendant acts in a way that can be seen as "figuratively enter[ing] the state in some way." *Id.*

This Court long ago rejected reliance on figurative "presence" to implement due process limits on personal jurisdiction, *see McGee*, 355 U.S. at 222, and for good reason. To start, the metaphor does little to provide guidance to the courts, particularly in the age of modern telecommunications and transportation. Today many intentional torts involve distinctly non-physical events, the location of which may be difficult (sometimes impossible) to pinpoint. For example, petitioner cites approvingly a decision finding personal jurisdiction in Colorado over a defendant who took out-of-state action (sending an email from the United Kingdom to eBay in California) to prevent an event (an on-line auction) from occurring in the forum (Colorado). Petr. Br. 28

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claims arising" out of a single incident "in a unitary proceeding." *Keeton*, 465 U.S. at 777. When multiple defendants act from different jurisdictions – as happened in this case, *see* J.A. 14 (naming unidentified official in Virginia as co-defendant for role in helping prepare false affidavit), or might happen in an anti-trust conspiracy – petitioner's rule would preclude any single court from adjudicating the claims against all of the defendants in a single proceeding.

(citing *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008)). If that amounts to being figuratively present in the forum, it is difficult to see why petitioner's conduct does not also qualify: he took out-of-state action (submitting a false affidavit in Georgia) with the intended effect of preventing an event (delivery of respondents' funds) from occurring in the forum (Nevada).

Indeed, petitioner offers that jurisdiction might have been proper in this case if "petitioner tried to forfeit . . . a bank account located" in Nevada. *Id.* 29. But this concession only serves to emphasize the ill-defined and manipulable nature of petitioner's figurative presence rule. Petitioner does not explain what it means, in these days of electronic banking, for a bank account to be located in a particular state. It is entirely possible, for example, that an account opened in Reno is maintained electronically on servers in Los Angeles, backed by currency or other deposits at the bank's headquarters in Charlotte, and accessible by computers and ATMs throughout the country. Is a defendant who uses a counterfeit debit card at an ATM in Montana "figuratively present" in the victim's home state of Idaho? Nothing in the presence metaphor provides the answer.

Moreover, petitioner makes no effort to explain why what he did in this case is any different from trying to forfeit respondents' Nevada bank accounts from the standpoint of Nevada's sovereign interests or fairness to him. A state protects property in the state (be it cash or bank accounts) not as an end in itself, but as a means of fulfilling its more fundamental commitment to protecting its *residents*. That is why, for example, Nevada has a legitimate

sovereign interest in preventing a defendant from conning its elderly out of their Social Security checks, whether the defendant commits the fraud in person in the state, over the phone from Connecticut, or over the Internet from Canada. In the end, when an act is "done with the intention of causing effects in the state," the particular mechanism for effecting the in-state harm is immaterial – principles of state sovereignty demand that the state "may exercise the same judicial jurisdiction over the actor, or over the one who caused the act to be done, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act done within its territory." RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 37 cmt. a (1971) (cited approvingly in *Calder*, 465 U.S. at 789).

c. Thus, in the end, petitioner has to admit that a "state 'has a significant interest in redressing injuries that actually occur within the State,'" even when the injurious conduct occurs elsewhere. Petr. Br. 33 (quoting *Keeton*, 465 U.S. at 776). Having backed himself into that corner, petitioner is forced to rest his entire case on the assertion that respondents' injury "did not occur within the state in any meaningful sense." Petr. Br. 33. But that claim cannot bear the weight he must put on it.

Petitioner argues that a victim of a financial fraud experiences that injury "wherever he happen[s] to be." Petr. Br. 33. From this he somehow concludes that because the injury could be felt *anywhere* it must be considered as occurring *nowhere* for purposes of *Calder*, leaving *no* state with a sufficient interest in protecting the victim to warrant exercise of

jurisdiction over an out-of-state defendant. *Id.* That remarkable claim has no basis in precedent or logic.

In *Calder* itself, the plaintiff alleged emotional and reputational injuries that likewise could be described as being felt "wherever [the plaintiff] happened to be present." Petr. Br. 33; *see Calder*, 465 U.S. at 785. Yet, this Court did not hesitate in finding that "the brunt of the harm, in terms of both respondent's emotional distress and the injury to her professional reputation, was suffered in California," *id.* at 789, because that is where she "lives and works," *id.* at 790.

That reasoning applies equally to financial injuries in cases like this one. If, for example, a defendant hacks into a victim's bank account or uses a stolen credit card, the injury is sensibly understood to be experienced where the victim was residing at the time of the loss.

That understanding does not provide the unlimited jurisdiction petitioner hypothesizes. When the unlawful act and the loss occur simultaneously at a physical location – for example, when the victim's purse is snatched on a street corner – the injury is properly understood to occur where the physical events took place. This is true even if the plaintiff also lacks access to the funds when she returns home. For Due Process purposes, the injury occurs when the deprivation takes place; it does not continuously re-occur for jurisdictional purposes whenever and wherever the victim feels the collateral consequences of the financial loss. Thus, the Ninth Circuit rightly perceived that a more significant Due Process question would arise if respondents had merely

alleged that petitioner unlawfully seized the funds in the Atlanta airport without more.

But this is a quite different case. Jurisdiction arises from the fact that petitioner, knowing that respondents were Nevada residents and having received exculpatory evidence from them in Nevada, submitted a false affidavit that prevented the return of funds money to them in Nevada. There is no question that this conduct caused injury, which obviously was suffered somewhere. That place certainly was not Georgia; by the time petitioner wrote his affidavit, respondents had long since departed Atlanta and were, instead, back at home in Nevada. The only sensible place to locate the occurrence of the injury is where respondents were living and working during the time in which they were deprived of their funds. That rule is easy enough to administer and avoids the prospect of giving plaintiffs an unlimited choice of fora.[9]

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[9] The United States asserts in passing that the harm respondents suffered in Nevada was "not any new economic loss, but simply the continuing effect of the prior seizure." U.S. Br. 17. Petitioner does not embrace that assertion, and rightly so. No one disputes that if petitioner had not filed his false affidavit, the money would have been returned to respondents months earlier than it was. The injury suffered during that period (the loss of the use of the money as working capital for respondents' business) is a distinct harm proximately caused by a distinct tort (the filing of the false affidavit) rather than some "continuing effect" of the initial seizure.

5. Petitioner Has Sufficient Minimum Contacts With Nevada To Support Personal Jurisdiction Over Respondents' False Affidavit Claim.

The requirements of *Calder* were plainly met in this case.

For purposes of this Court's decision, it is undisputed that petitioner intentionally targeted respondents in an attempt to prevent the government from returning their property. *See, e.g.*, Petr. Br. 23. It is further uncontested here that by the time he submitted the false affidavit, petitioner knew that respondents were Nevada residents. *See supra* p. 21 & n.6.[10] Finally, petitioner does not challenge the court of appeals' reading of the complaint as alleging that he knew that respondents would experience the injury resulting from his conduct in Las Vegas, where they were living and working. Pet. App. 27a-28a. That is all *Calder* requires.

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[10] Even if petitioner only knew that respondents were professional gamblers who practiced their trade in substantial part in Las Vegas – and therefore had "a significant connection to the forum," Pet. App. 23a – the result would be the same. The critical consideration is that petitioner knew that the injury inflicted upon respondents would be experienced in that jurisdiction. *See Calder*, 465 U.S. at 789-90.

B. Any Special Concerns Regarding Law Enforcement Defendants Are Appropriately Considered As Part Of The Reasonableness Inquiry, Which Petitioner Does Not Raise In This Court.

Petitioner and various *amici* voice concern that allowing *Calder* jurisdiction in the circumstances of this case could create special problems for law enforcement officials. Petr. Br. 36-37; U.S. Br. 18-22. They reason from this that the Court should sharply curtail *Calder* jurisdiction across the board, even in cases having no imaginable consequences of the concerns they raise. The Court should reject that invitation in favor of a more tailored approach.

1. Initially, it bears keeping in mind that the intentional targeting theory the court of appeals adopted has no application to most encounters between the police and citizens. Ordinarily, any tortious conduct by an officer – *e.g.*, an unlawful search, seizure, arrest, or use of excessive force, etc. – will result in an injury that is experienced at the place of the encounter, thereby limiting personal jurisdiction to the state in which the encounter occurred. *See supra* p. 27.

In any event, any special concerns relating to law enforcement can be accommodated in the subsequent reasonableness step of the due process inquiry. Even after concluding that a defendant has established minimum contacts under *Calder*, a court must still assess whether the exercise of jurisdiction in the particular case is reasonable. *See* Pet. App. 30a; *Burger King*, 471 U.S. at 477. In doing so, courts

may consider a wide range of factors, including "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'" *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

This case-specific reasonableness analysis is the appropriate stage at which to attend to concerns about special problems that might arise in particular contexts. For example, in assessing the reasonableness of exercising jurisdiction in a defamation case, a court might well consider dispositive the differences between a claim against a national tabloid like the *National Enquirer* and suit against a part-time blogger. *See* Petr. Br. 39; *Burger King*, 471 U.S. at 485-86 (suggesting the Due Process Clause may permit a distinction between contract actions between signatories to franchise agreements, on the one hand, and consumer contracts, on the other).

In this case, the court of appeals considered the special concerns of law enforcement officers as part of its reasonableness analysis, which petitioner does not challenge in this Court. *See* Pet. App. 31a-33a. The Court therefore can reserve for another day whether special law enforcement-related concerns render unreasonable otherwise permissible exercises of jurisdiction over defendants for whom minimum contacts are established under *Calder*.

2. Even if petitioner's policy objections were properly before the Court, they would provide no basis for reversal.

In *Calder*, this Court rejected a similar request by media defendants for especially stringent limits on personal jurisdiction in light of the risk that the prospect of out-of-state litigation would deter the exercise of First Amendment rights. The Court explained that the "potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. To reintroduce those concerns at the jurisdictional stage would be a form of double counting." 465 U.S. at 790 (citations omitted). So, too, in this case, the law already protects against the deterrent effect of litigation on public officials by affording them the special protection of qualified immunity, which must be decided early in the case and may be subject to immediate interlocutory appeal when denied. *See, e.g.*, *Richardson v. McKnight*, 521 U.S. 399, 407-08 (1997); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). At the same time, in this case, as in most cases involving federal officials, the litigation burden on the defendant was minimized by government representation. *See* Pet. App. 32a; 28 C.F.R. § 50.15. To be sure, as petitioner notes, such assistance is not guaranteed. But that is simply another reason to consider the burden on law enforcement through a case-by-case reasonableness determination.

At the same time, the reasonableness analysis must take into account the public interest in effective enforcement of the federal law (especially the

Constitution) and "the plaintiff's interest in obtaining convenient and effective relief." *World-Wide Volkswagen*, 444 U.S. at 292; *see also Burger King*, 471 U.S. at 477. Denying jurisdiction in cases such as this will predictably preclude many ordinary citizens of limited means from vindicating important constitutional rights when they are injured by official misconduct taking place far from home. And knowing that fact may embolden some law enforcement officers, who may come to expect that their actions are unlikely to be subject to effective legal challenge. That prospect is particularly troubling in the civil forfeiture context (especially when agencies are entitled to retain a portion of the funds forfeited), where the police may target individuals simply passing through a jurisdiction, knowing the difficulty they would face if forced to return to the state to bring any legal challenge.[11]

Finally, the reasonableness analysis should take into account the nature of the claim. As the United States argues, the adjudication of claims under *federal law* should require only that the defendant have sufficient contacts "with the Nation as a whole." U.S. Br. 11 n.5 (citation omitted); *see Nicastro*, 131 S. Ct. at 2789 (plurality) (because "jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," jurisdiction over federal question claims

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[11] *See, e.g.*, Marian R. Williams et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, (Institute of Justice, 2010), *available at* http://www.ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture-4; Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009).

depends on whether the defendant has "the requisite relationship with the United States Government"); 4 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1068.1 (3d ed. 2007). There likewise should be no due process objection to a state court exercising that same jurisdiction when it executes its duty to enforce federal law. Whether the federal claim is adjudicated in federal district court or the state court across the street makes no difference to the litigation convenience of the defendant or the sovereignty interests of other states.

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In the end, the Constitution gives authority for weighing considerations of fairness and public policy in the first instance, and principally, to Congress and the states. There is no reason to think that the nation's legislators will fail to take seriously the needs of law enforcement in crafting, or amending, personal jurisdiction rules. At the same time, however, the Due Process Clause surely provides those legislators leeway to permit suit in a victim's home state when a government official intentionally targets the plaintiff for injury in that forum, especially when the defendant is represented and indemnified by the government. *Cf.* 28 U.S.C. § 1391(e) (authorizing official capacity suits against federal officials in plaintiff's home district).

II. The Court Of Appeals Correctly Rejected Petitioner's Venue Objections.

Petitioner challenges the Ninth Circuit's venue ruling on three grounds, only two of which warrant this Court's review. First, he argues that "in cases like this where the only injury alleged is economic,

venue is proper only in the district or districts where the defendant's alleged conduct occurred." Petr. Br. 42; *see id.* 51-54. Second, he argues that in any event, the Court should at least declare that the rule supposedly applied by the Ninth Circuit (*i.e.*, that "venue is proper in a district if the plaintiff 'suffered harm' there or was otherwise 'affected' there by an alleged tort," *id.* 42) is wrong. *Id.* 43-48, 54-58. Third, even if the Ninth Circuit was correct to hold that venue may sometimes be appropriate in the district of injury, petitioner argues that it erred in concluding that venue was appropriate in Nevada on the facts of this particular case. *Id.* 49-51.

The Court should reject the first two arguments as inconsistent with the text, history, and purposes of the federal venue provision, as well as the decisions of this Court. The third, fact-bound challenge to the court of appeals' weighing of the relevant considerations in the context of this one particular case does not warrant this Court's review and is meritless besides.

A. Section 1391(b)(2) Does Not Limit Venue To The Place Of The Defendant's Wrongful Conduct.

The venue statute provides in relevant part that "[a] civil action may be brought in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). Nothing in the text, history, or purposes of this provision, or any decision of this Court, supports categorically

limiting venue to the district in which the defendant acted or failed to act.

1. Congress knows how to specify venue in the place in which a defendant's unlawful acts occurred. For example, in 28 U.S.C. § 1402(b), Congress provided for venue in Federal Tort Claims Act cases in any judicial district "wherein the act or omission complained of occurred." *See also* 28 U.S.C. § 1391(f) (1963) (allowing venue for automobile accident cases in the "the judicial district wherein the act or omission complained of occurred").[12]

By contrast, in Section 1391(b)(2), Congress used language that is plainly broader, permitting venue wherever a substantial portion of the "events" or "omissions" that "give rise" to the claim occurred. The words "events" and "omissions" naturally refer to the entire course of events relevant to the litigation. For example, when an insurance company denies a life insurance claim on the grounds that the decedent committed suicide, the alleged suicide is plainly part the "events" giving rise to the claim of breach of contract, even though it is not an element of the claim and does not involve conduct by the defendant. *Cf. McGee v. International Life Insurance Co.*, 355 U.S. 220, 223-24 (1957) (case arising from that factual scenario). Likewise, the policy holder's failure to make payments can be an "omission" that gives rise to the lawsuit that ensues when the insurer denies a claim.

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[12] As discussed below, this provision was subsequently repealed by Pub. L. 89-714, § 2, 80 Stat. 1111, 1111 (1966).

Thus, in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000), this Court found that venue to challenge an arbitral award was "clearly proper" in the district in which the contract at issue in the arbitration was to be performed, even though the arbitration occurred elsewhere. *Id.* at 198. Although the cause of action in the case was an alleged violation of the terms of the Federal Arbitration Act, which necessarily occurred at the place of the arbitration, the Court did not even pause to consider the possibility that the place of the arbitration was the *only* permissible venue under Section 1391(b)(2).

2. The breadth of Section 1391(b)(2) is confirmed by the history of the statute, which has been repeatedly amended to expand venue and allow courts to weigh a wider range of practical considerations in resolving venue objections.

As originally enacted in 1789, the venue provision permitted suit only in the district in which the defendant was "an inhabitant, or in which he shall be found at the time of serving the writ." 1 Stat. 79. It stayed that way until the middle of the last century, when Congress began to enlarge venue to account for the same kinds of modern realities that led this Court to expand personal jurisdiction in *International Shoe*.

The impetus for the change was a 1953 decision of this Court, holding that the location of an auto accident was not a proper venue when none of the parties was a resident of the district. *See Olberding v. Ill. Cent. R. Co.*, 346 U.S. 338, 340 (1953). That decision made litigating many such claims inconvenient for all the parties, given that the most

significant events in the case, as well as the likely witnesses, would often be located outside the parties' home states. In 1963, Congress reacted by enacting a provision allowing venue in auto-related cases in "the judicial district wherein the act or omission complained of occurred." 28 U.S.C. § 1391(f) (1963).

Three years later, Congress replaced the auto-specific provision with even broader language that applied to all manner of federal question and diversity claims, permitting venue in any judicial district "in which the claim arose." Pub. L. 89-714, § 1, 80 Stat. 1111, 1111 (1966). In so doing, Congress thus expressly rejected the prior language limiting venue to the district in which the defendant acted or failed to act.

This Court construed the 1966 amendment in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). There, although the Court made clear that the expansion was not intended to permit plaintiffs an unlimited choice of fora, it was nonetheless intended to expand venue considerations beyond the location of the defendant's allegedly unlawful conduct. The Court thus explained that important considerations included the "availability of witnesses, the accessibility of other relevant evidence," *id.* at 185, as well as "the nature of the action" and the law to be applied (which, although "[l]ess important" was "nonetheless relevant"), *id.* at 186.[13]

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[13] *See also* S. Rep. No. 89-1752, at 1-2 (1966) ("This enlargement of venue authority will facilitate the disposition of both contract and tort claims by providing, in appropriate cases,

In 1990, the venue provision was expanded yet further, to take its present form. The legislative history explains that the current statutory language had its origins in an American Law Institute (ALI) study published in 1968. *See* H.R. Rep. No. 101-734, at 23 (1990). Significantly, the ALI study specifically considered and rejected a proposal that venue should be limited to "any district where a defendant resides and . . . any district where the wrongful act, or a part thereof, occurred." ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 217-18 (1969) ("ALI STUDY"). The ALI proposed instead the current language as an "improvement" to the previous "arose" formulation that had been a source of confusion and litigation. *Id.* at 137. It stated that the goal of the change was to ensure that a "case should be tried in the district that is the most convenient for the parties and witnesses, and best serves the interests of justice." *Id.* at 217. Thus, the proposed revision would permit suit in any "district having a *substantial connection* with the matters in suit." *Id.* at 137 (discussing identical language in diversity provision) (emphasis added).

Selecting a district conducive to the "convenience of litigants and witnesses," *Leroy*, 443 U.S. at 187 (citation omitted), requires taking into account not only the location of defendant's acts, but other events that may be relevant to the litigation. In some cases, the defendant's conduct may be relatively unimportant to those considerations. For example,

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a more convenient forum to the litigants and the witnesses involved.").

liability may be conceded, but damages contested. Even when liability is contested, it may not turn on the conduct of the defendant. For instance, the case may center on an affirmative defense that hinges on the plaintiff's actions (*e.g.*, the defenses of consent, waiver, contributory negligence, unclean hands, etc.). In such cases, holding the trial where the defendant acted could be inconvenient for everyone involved.

B. Section 1391(b)(2) Does Not Forbid Venue In The District In Which The Plaintiff Suffers The Injury Giving Rise To The Claims.

Petitioner additionally argues that even if Section 1391(b)(2) does not categorically limit venue to the places of the defendant's acts or omissions, the Ninth Circuit nonetheless erred in holding that "venue is proper in a district if the plaintiff 'suffered harm' there or was otherwise 'affected' there by an alleged tort." Petr. Br. 42. That argument misconstrues both the decision below and the scope of the federal venue statute.

1. The court of appeals did not purport to establish any categorical rule permitting venue in the plaintiff's home district so long as she "suffered harm" or was otherwise "affected" by the defendant's conduct there. *Contra* Petr. Br. 42.

To the contrary, the court simply held that "the locus of the injury [is] a *relevant factor*," in the venue analysis, not the only one. Pet. App. 41a (emphasis added). The court also considered a variety of other aspects of the case. For instance, the court explained that that issues regarding "the origin and legitimacy of the $97,000" seized by petitioner were focused on

Nevada, from which the $30,000 bank originated. *Id.* Moreover, "the documentation of the legitimacy of the money was sent from Nevada" and "the funds eventually were returned to Fiore and Gipson in Nevada, verifying the lack of probable cause for the forfeiture." *Id.* 42a. Finally, the court took into account that the "arrival of the funds in Nevada was the event that caused Fiore and Gipson's cause of action to mature, because their case was not ripe until the government abandoned the forfeiture case against them." *Id.* It was only by "[t]aking *all these events together*" that the court concluded that venue was "proper in the District of Nevada." *Id.* (emphasis added).

2. To the extent petitioner argues that the locus of the plaintiff's injury is not even a relevant factor in the venue analysis, he is clearly wrong. For most torts, the existence of injury is an element of the plaintiff's claim, often tied to the running of the statute of limitations. *See, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Accordingly, the suffering of that injury is one of the "events . . . giving rise to the claim." 28 U.S.C. § 1391(b)(2). And where that event occurs may determine the location of important evidence and witnesses in the case. For example, in this case, the evidence and witnesses concerning respondents' injuries was necessarily focused in Las Vegas, where they engaged in their profession.

Thus, in *Nicastro*, three members of this Court noted, without disagreement from any other Justice, that "the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim" under Section 1391. *See* 131 S. Ct. at 2798 (Ginsburg, Sotomayor, and Kagan, JJ.,

dissenting). Citing this statement, petitioner himself ultimately acknowledges that the district in which the plaintiff suffers an injury *can be* a place where an "event . . . giv[es] rise to the claim" within the meaning of Section 1391(b)(2), at least in product liability cases. Petr. Br. 52.

But petitioner does not explain why a financial injury cannot also give rise to a claim. Like the physical injury in a products liability case, a financial injury is frequently a necessary element of the plaintiff's claim. In this case, for example, if respondents had not suffered any financial injury from petitioner's false affidavit (if, for example, it had never been received or was immediately ignored, and therefore did not delay the return of respondents' funds) there would be no claim.

Harkening back to his personal jurisdiction arguments, petitioner raises the specter of venue traveling with the plaintiff everywhere she "feels the 'impact' of the alleged tort." Petr. Br. 44. But again, petitioner elides the distinction between the event of suffering a tortious injury, and the continuing collateral consequences of that injury. *See supra* p. 27. Venue is permissible in Nevada because that is where petitioners experienced the financial injury giving rise to their claim; it would not follow them if they subsequently moved to Alaska. *Contra* Petr. Br. 47.

There is no reason to think that Congress intended to categorically preclude venue in the district of injury, rendering the federal courts substantially less open to victims of targeted intentional torts than the state courts. Indeed, on petitioner's theory, the plaintiff in *Calder* could not

have brought a diversity action in California, even though this Court held that the case was appropriately heard in California state court. Even worse, the defendants could have removed the suit to federal court, then had it transferred to Florida on the theory that venue would only lie in that state. *See* 28 U.S.C. §§ 1390(c), 1441. Thus, on petitioner's view, it turns out that an "individual injured in California" actually *does* need to "go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Calder*, 465 U.S. at 790.

Likewise, under petitioner's interpretation, the victim of credit card fraud, the person whose online bank account was hacked, the teenager subjected to cyber-stalking, and countless other victims of targeted intentional torts by out-of-state defendants cannot seek relief in the federal district court in which their injuries were suffered, even if Congress has extended them the protection of federal law. There is no reason to believe Congress intended that perverse result.

C. Petitioner's Case-Specific Objections To The Court Of Appeals' Fact-Bound Venue Decision Provide No Basis For Reversal.

Petitioner is thus left to argue that the court of appeals erred in its evaluation and weighing of the relevant venue considerations in this one particular case. But that fact-bound question is not within the scope of the Question Presented (which asks a categorical question, *see* Pet. i), does not implicate

any circuit conflict, and does not otherwise warrant an expenditure of this Court's resources.

Nor, in any event, would such review change the outcome, as respondents' claim in this case arose in substantial part from events occurring in Nevada. As discussed, respondents' claims depend on their assertion that petitioner's false affidavit caused them injury in Nevada. Their claims thus arise in substantial part from the event of their injury, which occurred in Las Vegas.

That is also where a significant portion of the evidence and substantial number of the witnesses in the case are located. For example, respondents allege that petitioner failed to disclose material exculpatory information in an attempt to delay the return, and prompt permanent forfeiture, of respondents' funds. That exculpatory information was gathered and sent from Nevada, where the evidence supporting that claim will be found. Moreover, the evidence and witnesses needed to establish the existence and amount of damages suffered by respondents as a result of the delay in the return of their funds is in Nevada. And, of course, respondents' testimony will be central to almost every aspect of the case.

Thus, while Georgia also may have been a permissible venue, Section 1392(b)(2) does not preclude suit in Nevada.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.[14]

Respectfully submitted,

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[14] If the Court were to determine that the district court lacked personal jurisdiction over petitioner or that venue did not lie in the District of Nevada, it should remand to allow the lower courts to determine whether respondents should be allowed to request a transfer to the District of Georgia. *See* 28 U.S.C. §§ 1631, 1406. Although respondents told the district court in 2008 that they were in no position at that time to prosecute this action in Georgia, and would prefer a dismissal in order to take an appeal from any adverse personal jurisdiction ruling, *see* Pet. App. 73a, five years have passed since then. It would be in the interests of justice to permit the district court to revisit this issue in light of changed circumstances.

REPLY BRIEF

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In the
Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

I. Due process requires conduct aimed at the forum state, not merely at a person with known connections to the forum state 2

A. Conduct aimed at an individual with known connections to the forum state is insufficient 2

B. Respondents' position contravenes basic principles of state authority 7

C. The Ninth Circuit's approach imposes unfair burdens on defendants 13

II. Venue is not proper in a district simply because a plaintiff feels the effects of a tort there 15

A. The proper venue is where the "events and omissions giving rise to the claim occurred" 15

B. Respondents' reading ignores Congress's intent 17

C. Respondents mischaracterize petitioner's position 20

TABLE OF AUTHORITIES

Cases

Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.,
480 U.S. 102 (1987) 2

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 2, 7, 12, 14

Burnham v. Super. Ct. of Cal.,
495 U.S. 604 (1990) 9

Calder v. Jones,
465 U.S. 783 (1984) 2, 5, 6

Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.,
529 U.S. 193 (2000) 22

Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,
514 F.3d 1063 (10th Cir. 2008) 5, 9

Goodyear Dunlop Tires Ops., S.A. v. Brown,
131 S. Ct. 2846 (2011) 3

Hanson v. Denckla,
357 U.S. 235 (1958) 3, 7

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 4

J. McIntyre Mach., Ltd. v. Nicastro,
131 S. Ct. 2870 (2011) 3, 7, 8, 12

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) 2, 3

Kulko v. Super. Ct. of Cal.,
436 U.S. 84 (1978) 2, 3

Leroy v. Great W. United Corp.,
443 U.S. 173 (1979) 16, 17, 18, 21

McFadin v. Gerber,
587 F.3d 753 (5th Cir. 2009) 14

McGee v. Int'l Life Ins. Co.,
355 U.S. 220 (1957) 21

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 19

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.,
484 U.S. 97 (1987) 12

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75 (1998) 19

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 13

Rush v. Savchuk,
444 U.S. 320 (1980) 3

Woodke v. Dahm,
70 F.3d 983 (8th Cir. 1995) 21

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 8, 13

Statutes

28 U.S.C. § 1391(a) (1988) 17

28 U.S.C. § 1391(b)(2) ..... *passim*

28 U.S.C. § 1404(a) 18

Nev. Rev. Stat. § 14.065(1) 12

Rules

Fed. R. Civ. P. 4(k)(1)(A) 12

S. Ct. R. 15.2 13

Other Authorities

ALI, Study of the Division of Jurisdiction Between State and Federal Courts (1969) 20

H.R. Rep. 101-734 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6869 20

Random House Webster's Unabridged Dictionary (2d ed. 1998) 16, 17

REPLY BRIEF FOR PETITIONER

Under respondents' vision of personal jurisdiction, all it takes to hale someone into a distant forum is to allege that he committed an intentional tort aimed at a plaintiff who has connections to the forum. That view has no support in this Court's precedent, which requires that the defendant have meaningful contacts with the forum. The Ninth Circuit's approach—equating conduct aimed at a plaintiff who has forum-state contacts with conduct aimed at the forum state itself—merely defines away the required inquiry. Alleging that petitioner knew that respondents would feel in Nevada the effects of his conduct in Georgia—the loss of the use of their seized cash—cannot transform petitioner's conduct into conduct aimed at Nevada.

As to venue, respondents have no answer to the statutory text, which requires that substantial "events or omissions giving rise to the[ir] claim[s]" have "occurred" in Nevada. 28 U.S.C. § 1391(b)(2). Feeling in Nevada (and wherever else they happened to be) the inability to use their cash while it was in government custody cannot be described as an "event[]" that "occurred" in Nevada.

Respondents' arguments cannot obscure the simple truth that petitioner has no contacts with Nevada and no event or omission giving rise to respondents' claims occurred there.

I. DUE PROCESS REQUIRES CONDUCT AIMED AT THE FORUM STATE, NOT MERELY AT A PERSON WITH KNOWN CONNECTIONS TO THE FORUM STATE

A. Conduct Aimed At An Individual With Known Connections To The Forum State Is Insufficient

Respondents argue that intentional conduct directed toward someone with known connections to the eventual forum state suffices. That argument finds no support in *Calder v. Jones*, 465 U.S. 783 (1984), or this Court's other personal-jurisdiction decisions.

1. A defendant must have contacts with the forum state itself before he may be subject to its jurisdiction. Although the Court has expressed this foundational principle in different ways in different kinds of cases, precedent forecloses the notion that conduct directed toward an individual with known connections to a forum is sufficient by itself.

The Court has stressed that personal jurisdiction depends on the "defendant's contacts with the forum State." *Calder*, 465 U.S. at 790; *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84, 91 (1978). It has emphasized that the jurisdictional "inquiry focuses on the relations among the defendant, the forum, and the litigation." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984). And it has consistently made clear that out-of-state defendants must have "purposefully directed" conduct at the forum state. See *id.* at 774; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); see also *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987) (plurality op.); *J.*

McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2870, 2788 (2011) (plurality op.); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Moreover, this Court has decisively rejected the notion that the "*plaintiff's* contacts with the forum are decisive in determining whether the *defendant's* due process rights are violated." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (emphases added); see also *Kulko*, 436 U.S. at 93–94. This is not to say that a plaintiff's residence in a forum is always irrelevant. But it matters only to the extent it "enhance[s] the defendant's contacts with the forum." *Keeton*, 465 U.S. at 780; see also *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S. Ct. 2846, 2857 n.5 (2011). In short, the Court's cases invariably affirm that conduct by the defendant purposefully directed at the forum state itself is required.

2. Respondents grudgingly acknowledge this overwhelming weight of precedent, Resp. Br. 23–24, but argue for a special exception for intentional torts. An intentional-tort defendant, respondents argue, need only have aimed his conduct at an individual with known forum connections. *Id.* at 24–25.

a. Respondents acknowledge that the requirement of forum-directed conduct is normally necessary to provide a defendant a "measure of predictability and control over its own amenability to suit." *Id.* at 24. But intentional-tort defendants have no need for such protections, respondents contend, because "the scope of [their] exposure to suit in other states is limited, predictable, and largely within their own control—they are subject to suit only in those states in which they target a forum resident . . . ." *Id.* at 25.

Not every intentional-tort defendant is an intentional tortfeasor, however. On respondents' approach, a person's amenability to suit in a particular forum is based on what a plaintiff is willing to allege, which no prospective defendant can "limit[], predict[], [or] control." *Ibid.*; see Pet. Br. 35–36.[1]

Making matters worse, many intentional-tort claims turn on the defendant's mental state. With plaintiffs' allegations taken as true, blameless defendants would rarely be able to vindicate their personal-jurisdiction defense on this basis before being subjected to extensive factual proceedings in a distant forum. See, *e.g.*, Pet. App. 14a ("We will draw reasonable inferences from the complaint in favor of the plaintiff where personal jurisdiction is at stake, and will assume credibility."). This concern is precisely why the Court recognized that a qualified-immunity standard focused on the defendant's mental state could not vindicate the important interest in early resolution. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815–16 (1982). Accordingly, there is no reason to think that intentional-tort defendants do not need the protections the Due Process Clause provides for other defendants.

b. Respondents' argument also finds no support in this Court's cases. Respondents' strained reading

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[1] Respondents err in stating that "petitioner has not denied the allegations in the complaint . . ." Resp. Br. 36. Petitioner *has* denied respondents' allegations. See, *e.g.*, Cert. Reply 12 ("respondents' allegations of misconduct by petitioner are false"). Petitioner has not done so formally in the district court, but that is only because this case is at the motion-to-dismiss stage.

of *Calder* proves the point. They argue that jurisdiction was proper there "'based on the effects of [the defendants'] Florida conduct in California,' not based on the subject matter or sources of the story that caused those effects," and that the connections between California and the defendants' conduct were merely "subsidiary facts" that "explain[ed] why the effects of the defendants' conduct were felt in California." Resp. Br. 31 (citation omitted).

But the Court immediately preceded the statement that "jurisdiction over [the defendants] is *therefore* proper in California based on the effects of their Florida conduct in California" with the observation that the article's subject matter and sources established California as the "focal point" of the defendants' conduct. *Calder*, 465 U.S. at 788–89. Far from explaining that the holding was "not based on the subject matter or sources of the story," Resp. Br. 31, the opinion shows that California's status as the "focal point" of the defendants' conduct was essential. See *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1074 (10th Cir. 2008) ("[*Calder*] also stressed that the defendants' conduct was 'expressly aimed at California.' In the sentences immediately following its introduction to this concept, the Court emphasized that California was the 'focal point' of the allegedly tortious story." (citations omitted)).

Nor, indeed, would the connections between California and the defendants' conduct noted by the Court have "explain[ed] why the effects of the defendants' conduct were felt in California," Resp. Br. 31. Jones would have suffered the effects of defamation—such as emotional distress and reputational harm—wherever she happened to be. That the arti-

cle's sources were drawn from California and its subject matter was focused on California, see *Calder*, 465 U.S. at 788–89, were separate points that had no bearing on where she would have felt the effects of the alleged tort. Instead, such facts were significant precisely because they established that California was the "focal point" of the *defendants' conduct*—not merely of the plaintiff's injury.

Calder was thus not the jurisdictional revolution that respondents claim. Rather than establishing a new and unique exception to previously recognized due-process rules, the Court merely applied existing principles—including the requirement that a defendant have contacts with the forum state itself—to the claim before it. See U.S. Br. 14–15. Respondents' reading of *Calder* is also implausible at a deeper level. *Calder* was a short unanimous opinion that reaffirmed, not repudiated, traditional personal-jurisdiction principles. No court—not even the decision below—has read *Calder* as eliminating the requirement that the defendant have contacts with the forum state itself and not merely with the plaintiff. Instead, lower courts have consistently interpreted *Calder*'s express-aiming requirement as an application of, not an exception to, the purposeful-direction rule, see Pet. Br. 21–25, and even the Ninth Circuit paid lip service to the notion that the defendant's conduct must be expressly aimed at the forum state in addition to causing injury in the state, see Pet. App. 16a.

None of this Court's other cases supports respondents' theory either. Respondents cite *Burger King* for the proposition that "[i]n cases involving intentional torts against targeted victims, the Court

has held that 'a forum legitimately may exercise personal jurisdiction over a nonresident who purposefully directs his activities toward forum residents,'" Resp. Br. 24, but *Burger King* held no such thing. Far from containing a novel holding applicable to intentional-tort claims, the *Burger King* opinion does not even contain the word "intentional." The language respondents quote was merely introductory: "We have noted several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents." 471 U.S. at 473. And after identifying the various interests and burdens at stake, the Court concluded: "*Notwithstanding these considerations*, the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Id.* at 474 (emphasis added). Despite respondents' creative license, *Burger King* thus reaffirms that the "constitutional touchstone" is whether the defendant has minimum contacts with the forum state and does not suggest, let alone hold, that contacts with a plaintiff who has forum-state connections suffice.

B. Respondents' Position Contravenes Basic Principles Of State Authority

"[J]urisdiction is in the first instance a question of authority." *J. McIntyre*, 131 S. Ct. at 2789 (plurality op.). Due process restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson*, 357 U.S. at 251; see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.

286, 292 (1980). And because jurisdiction is a function of territorial authority, a state cannot exercise jurisdiction over a defendant unless he directed his conduct toward the forum state, such that he can be said to have at least figuratively entered the state. See Pet. Br. 33.

1. Respondents concede that our federal system limits state courts' territorial authority, see Resp. Br. 38, but misunderstand the scope and importance of those limits. Their discussion of *Calder* is illustrative. They ask rhetorically:

> If it is fundamentally unfair to hale a Florida defendant into a California court solely because he targeted a California resident for defamation, how does that same exercise of power suddenly become consistent with traditional notions of justice and fair play when the story happens to involve events in California or is based in part on California sources? How could the fact that an article mentions California activities, or was based on phone calls to that state, tip the scales in giving California "the power to subject the defendant to judgment" for their [sic] defamatory conduct?

Id. at 32 (quoting *J. McIntyre*, 131 S. Ct. at 2789 (plurality op.)). The answer is that, as *Calder* recognized, whether the state is the "focal point" of the alleged tort makes the difference, because a state can hale into court only persons who have meaningful connections with the state itself. Facts like those relied on by *Calder* can demonstrate that the defendant has reached into or targeted the state, rather

than merely targeting a person who happens to have forum-state connections that are incidental to the defendant's conduct.

Respondents pepper the Court with hypotheticals involving computer hacking, electronic banking, and other scenarios not presented by this case and argue that traditional limits on state authority are outmoded because of such modern technology. See, *e.g.*, Resp. Br. 40–41. But these limits are inherent to our federal system and cannot be so lightly discarded. See *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 610–16 (1990) (plurality op.). Nor is there any reason to think that new technologies will require this Court to abandon traditional personal-jurisdiction principles. To the contrary, courts have managed to apply those principles without apparent difficulty to cases involving new technologies. Consider, for example, *Dudnikov*, 514 F.3d at 1063, which respondents tout as showing the doctrinal problems presented by modern technology. See Resp. Br. 39–40. There, the Tenth Circuit held that a British corporation aimed its conduct at Colorado where it contacted an internet auction site in California to prevent an online auction of goods located in Colorado. 514 F.3d at 1075–76. Although *Dudnikov* involved the internet, the court's holding fit comfortably within the traditional framework because the defendant reached into Colorado by preventing a "Colorado-based sale" of goods located there. *Ibid.*

Here, by contrast, petitioner's alleged conduct merely delayed the return of respondents' cash to them after its seizure in Georgia. That the cash was eventually returned to them in Nevada may have reflected either their connections to Nevada or their

attorney's. But it is happenstance from petitioner's perspective that respondents asked that the cash be sent to them in Nevada rather than in California (where they also allegedly maintain a residence) or somewhere else. Petitioner never reached into Nevada, literally or figuratively.

In short, respondents' suggestion that new technologies are incompatible with established principles of state authority is without support, and there are good reasons for caution in considering whether to extend personal-jurisdiction doctrine beyond traditional limits. See Chamber of Commerce Br. 8–15. This case, moreover, involves no vexing or novel technological complexity. The seized cash had a straightforward physical presence, and it was not in Nevada; it will be time enough to address respondents' hypotheticals about property with no traditional physical presence (such as money in an electronic account) in cases involving such property where the issue is not hypothetical. Perhaps in such a case the Court will deem the money to be located in the state where the account-holder opened the account, such that hacking into the account and stealing the money electronically could be viewed as reaching into the state where the account-holder opened the account. See Resp. Br. 40. Perhaps the Court will opt for a different approach. Perhaps Congress will step in and modify service-of-process requirements for such situations. In all events, respondents offer no reason why the Court should reach out here to revise basic principles of state authority and personal jurisdiction out of concern for hypothetical cases that have yet to arise.

2. Respondents also contend that providing redress for residents who feel the effects within their borders of tortious conduct occurring elsewhere is a state's "most basic sovereign responsibility." Resp. Br. 37. If that were true, one would expect at least some states to say so. Instead, 18 states (and the District of Columbia) have argued forcefully that the interests to which respondents point are "outweighed by their interest in protecting their residents from being haled, unfairly, into other States' courts as defendants," States Br. 1, and not a single state has chosen to support respondents.

While a state may want to provide its residents (or non-residents who have "connections" to the state, or even the public at large) with redress, that desire is not enough. To be consistent with due process, a state's exercise of jurisdiction over a person must be tied in some way to its legitimate sphere of sovereign power. And respondents have offered no support for the notion that a state has limitless authority to regulate conduct that occurs in another state and concerns property located in another state, simply because that conduct affects an individual with connections to the forum state. If that were correct, there would be no meaningful limits on a state's jurisdiction at all—which, tellingly, is the position that respondents' lone amicus candidly advances. See WILG Br. 10 ("There should be no territorial limits on the power of the states to exercise adjudicatory jurisdiction."). That is plainly not the law. See Pet. Br. 31–34; States' Br. 5–6.

3. Respondents also contend that the "adjudication of a *federal* claim in a *federal* court in Nevada poses no threat to the federal structure or any offense

to the sovereignty of the state of Georgia," because the court is "vindicat[ing] the authority of the federal government, not the territorially more limited power of the state." Resp. Br. 38. But that respondents bring federal claims in federal court is irrelevant. Respondents effected service of process pursuant to Nevada's long-arm statute, which goes to the limits of due process. See Pet. App. 68a–69a; Nev. Rev. Stat. § 14.065(1). Therefore, the relevant question is whether a Nevada court could exercise jurisdiction over petitioner consistent with the Fourteenth Amendment. See Fed. R. Civ. P. 4(k)(1)(A); *Burger King*, 471 U.S. at 464, 468 n.10; *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987); see also U.S. Br. 10–11. Whether the underlying suit involves a state or federal claim has no bearing on Nevada's power to subject petitioner to its jurisdiction.

Indeed, respondents' argument proves far too much. If Fourteenth Amendment due-process principles were irrelevant to all federal claims brought in federal court, the Ninth Circuit's minimum-contacts analysis would have been entirely unnecessary, because the relevant sovereign for Fifth Amendment purposes is the United States as a whole, not the state which a federal court sits. See *J. McIntyre*, 131 S. Ct. at 2789 (plurality op.); see also U.S. Br. 11 n.6. Yet this Court has never suggested that federal courts can forgo the minimum-contacts inquiry simply because the plaintiff raises a federal claim. See, *e.g.*, *Burger King*, 471 U.S. at 468, 478–82 (analyzing defendant's contacts with Florida even though plaintiff brought a federal claim in federal court). Nor, in any event, did respondents ever make that

suggestion until their merits brief—meaning that any such contention is unpreserved in addition to being incorrect. S. Ct. R. 15.2.

C. The Ninth Circuit's Approach Imposes Unfair Burdens on Defendants

The Ninth Circuit's approach, if it became the law of the land, would have pernicious consequences for many types of defendants. As petitioner and several amici explained, federal and state law-enforcement officers, journalists and publishers, internet users, and businesses will all be victims. See Pet. Br. 36–40; U.S. Br. 18–22; FLEOA Br. 8–14; Chamber of Commerce Br. 2–3. According to respondents, however, the Court need not be concerned about these implications of their express-aiming position, because these concerns are more properly considered under the separate heading of the "case-specific reasonableness analysis." Resp. Br. 46. Respondents' contention is unpersuasive on multiple levels.

First, reasonableness is critical to the minimum-contacts requirement at issue here itself. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) ("The purpose of [the minimum contacts] test, of course, is to protect a defendant from the travail of defending in a distant forum, unless the defendant's contacts with the forum make it just to force him to defend there."); *World-Wide Volkswagen*, 444 U.S. at 291–92. As a result, the fact that respondents' approach to the express-aiming requirement would produce unreasonable results belongs front and center in this case. Even if it were true that those unreasonable results would be mitigated via a dis-

tinct "reasonableness" analysis, that would be no justification for adopting an unreasonable approach to the express-aiming requirement in the first place.

In any event, respondents drastically overstate the utility of the "case-specific reasonableness analysis" to which they ask the Court to defer. Respondents acknowledge that personal-jurisdiction rules are supposed to enable citizens to predict and even control where they may be haled into court, Resp. Br. 23–25, but the "reasonableness" analysis is a multi-factor, judge-made balancing test that is far too indeterminate to fulfill that important purpose. Moreover, courts rarely decline to exercise jurisdiction based on this nebulous analysis. *E.g.*, *McFadin v. Gerber*, 587 F.3d 753, 759–60 (5th Cir. 2009) ("[I]t is rare to say the assertion [of jurisdiction] is unfair after minimum contacts have been shown."). The decision below, for example, placed the burden on petitioner to show a "compelling case" why asserting jurisdiction would be unreasonable. Pet. App. 30a; see *Burger King*, 471 U.S. at 477–78.

Indeed, the Court need look no further than the decision below for proof that the "reasonableness" analysis is no substitute for a reasonable approach to the express-aiming requirement. The Ninth Circuit filled over four pages of the Federal Reporter with its balancing of several factors, some of which themselves were "fairly evenly balanced" or "not given much weight," Pet. App. 35a, before ultimately concluding that "[t]aken as a whole, the seven-factor reasonableness analysis disfavors Georgia as a forum and, overall, mildly favors Nevada," *id.* at 36a. The decision below belies respondents' suggestion that a expansive approach to express aiming is acceptable

because courts can be counted on to rein in the excesses at the "reasonableness" stage.

II. VENUE IS NOT PROPER IN A DISTRICT SIMPLY BECAUSE A PLAINTIFF FEELS THE EFFECTS OF A TORT THERE

A. The Proper Venue Is Where The "Events And Omissions Giving Rise To The Claim Occurred"

28 U.S.C. § 1391(b)(2) provides that venue lies in a judicial district where a "substantial part of the events or omissions giving rise to the claim occurred." Accordingly, the relevant inquiry is whether (1) events or omissions; (2) that gave rise to the claim; (3) occurred in the district. In a case like this one, where the only "events or omissions" that gave rise to the claim were actions by the defendant, the location of those actions is the only possible venue under the plain language of the statute. See Pet. Br. 52.

Rather than grapple with this textual analysis, respondents endorse a vague, multi-factor approach that would resolve venue questions with the sole purpose of ensuring the "convenience of litigants and witnesses." Resp. Br. 54. According to respondents, the Ninth Circuit properly considered not only the locus of injury, but also various Nevada-related facts about the case: respondents took some of the cash with them from Nevada when they embarked on their trip, respondents and their attorney sent documents from Nevada verifying the cash's legitimacy, and the government returned it to respondents (or their attorney) in Nevada. *Id.* at 55–56.

This approach has no basis in the statutory text. The statute requires focusing on "the events or omissions giving rise to" respondents' claim, and none of the allegedly "relevant factor[s]" to which respondents point, *id.* at 56, constitutes an "event[] or omission[] giving rise to [their] claim."

First, respondents rely on the location of their injury, but they never explain how the ongoing inability to use their cash could constitute an "event." An "event" is "something that occurs in a certain place during a particular interval of time." Random House Webster's Unabridged Dictionary 671 (2d ed. 1998); Pet. Br. 45. Respondents' lack of access to the seized cash for the six months it was in government custody cannot be described as an "event" that "occurred" in Nevada (or anywhere else); that injury was simply a lingering economic harm that followed respondents wherever they happened to be. See *Leroy v. Great W. United Corp.*, 443 U.S. 173, 186–87 (1979); Pet. Br. 44; U.S. Br. 27–28.

Indeed, respondents themselves argue that there is a "distinction between the event of suffering a tortious injury, and the continuing collateral consequences of that injury," such that once respondents felt the financial injury from the loss of the use of their cash, "it would not follow them." Resp. Br. 57. This concession further dooms respondents' case: "the event" of the seizure of the cash occurred in Atlanta, and respondents lost the use of the cash then and there. On respondents' own terms, "the continuing collateral consequences of that injury" do not count as an "event" that "occurred" in Nevada.

Nor do the other facts on which respondents rely—such as the origin of some of the cash, the sending of documents from Nevada, and the arrival of the cash in Nevada, see Resp. Br. 55–56—support the Ninth Circuit's venue ruling. Even assuming that some of these facts could be considered "events" that "occurred" in Nevada, none "g[ave] rise to the claim." These facts may be "relevant to the litigation" in some attenuated sense, *id.* at 51, but they did not "originate," "produce," "cause," or serve as the source of respondents' claims. See Random House Webster's Unabridged Dictionary 1660 (defining "give rise to"); Pet. Br. 50; U.S. Br. 30–31. They are thus irrelevant.

B. Respondents' Reading Ignores Congress's Intent

In addition to ignoring § 1391(b)(2)'s text, respondents disregard Congress's intent. "In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy*, 443 U.S. at 183–84. For that reason, the Court found it "absolutely clear" that Congress could not have intended "to provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts." *Id.* at 184–85.

When Congress amended § 1391(b)(2) in 1990, 11 years after *Leroy*, it gave no indication that it meant to deviate from the usual purpose of venue provisions. To the contrary, Congress eliminated a provision that had authorized venue in diversity actions "in the judicial district where all plaintiffs . . . reside." 28 U.S.C. § 1391(a) (1988). It is highly unlikely

that Congress nonetheless intended its amendment to § 1391(b)(2) to allow diversity and federal-question plaintiffs to sue in any venue where they felt the effects of an injury, which would often include their district of residency. See Pet. Br. 56; U.S. Br. 29–30. Respondents never acknowledge this evidence of Congress's intent.

Instead, respondents argue that Congress's goal in enacting § 1391(b)(2) was to provide for venue in any district "conducive to the 'convenience of litigants and witnesses.'" Resp. Br. 54 (quoting *Leroy*, 443 U.S. at 187). Respondents ignore that *Leroy* was emphatic that "the convenience of the defendant (but *not* of the plaintiff)" was a permissible venue consideration. 443 U.S. at 185. Even more fundamentally, respondents ignore that § 1391(b)(2) does not say that venue is permissible wherever would be "convenien[t]" in a given case. Congress could have enacted a venue provision devoid of legal content that simply directed courts to seek convenience on a case-by-case basis. Cf. 28 U.S.C. § 1404(a) (permitting transfer for convenience only to districts in which venue would have been proper in the first instance). But instead Congress enacted § 1391(b)(2), which limits venue to districts where "events or omissions giving rise to the claim occurred."

Respondents have two arguments for why Congress would have intended § 1391(b)(2) to be as broad as they claim. First, they contend that § 1391 "has been repeatedly amended to expand venue." Resp. Br. 52. This argument is wrong on its own terms; in the very legislation that created § 1391(b)(2), Congress contracted venue by removing diversity plaintiffs' ability to sue in their district of residence. See

Pet. Br. 55–56. But even if respondents were correct that Congress had consistently expanded venue, that would not mean Congress had expanded venue so vastly that venue restrictions had ceased to restrict. The actual statutory language Congress used is far more probative of what Congress intended than a general trajectory over the decades. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("[T]he best evidence of Congress's intent is the statutory text."). As explained above, respondents never grapple with the statutory language.

Respondents' other support for their view of Congress's purpose is a 1969 American Law Institute study. Respondents reason that (1) Congress's 1990 amendments used language first suggested in the 1969 ALI study; (2) the study rejected limiting venue to "any district where a defendant resides and . . . any district where the wrongful act, or a part thereof, occurred"; (3) the study described its proposed language as "permit[ting] suit in any 'district having a substantial connection with the matters in suit'"; and (4) it thus intended to endorse the view that venue is proper wherever is convenient, taking into account whatever "may be relevant to the litigation." Resp. Br. 54.

To call this a thin reed would be unfair to thin reeds. This study was written more than two decades before § 1391(b)(2) was enacted, and not even by a congressional committee or even a lone Member. "[W]e are governed" by "the provisions of our laws," not "the principal concerns of [their drafters]"—and certainly not unenacted discussion in a private study written a generation earlier. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Because

§ 1391(b)(2) is clear, the ALI study could not justify adopting a countertextual reading of that statute—ignoring the phrase "events or omissions giving rise to the claim occurred"—even if it were true that the ALI thought, 21 years earlier, that its proposed language would permit venue in any district that would be convenient.

But that is, in any event, not true. The "matters in suit" language seized upon by respondents is merely a loose paraphrase, and the "convenience" language is merely precatory. See ALI, Study of the Division of Jurisdiction Between State and Federal Courts 137, 217 (1969). The study never suggests that venue would be proper in a district that had "a substantial connection with the matters in suit" or that would be "convenient," Resp. Br. 54, if "the events or omissions giving rise to the claim" did *not* "occur[]" there. To the contrary, the study suggests that what later became the statutory language refers exclusively to the district in which the defendant's conduct occurred. See ALI Study 218 (where there are multiple defendants who reside in different districts, "the place of the wrong is . . . the only possible venue").[2]

C. Respondents Mischaracterize Petitioner's Position

Lacking a response to the statutory text, respondents attack straw men.

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[2] The 1990 Federal Courts Study Committee report, which respondents do not cite, likewise does not endorse respondents' countertextual interpretation. See H.R. Rep. 101-734 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6869.

1. Respondents contend that "[n]othing in the text, history, or purposes of [§ 1391(b)(2)], or any decision of this Court, supports categorically limiting venue to the district in which the defendant acted or failed to act." Resp. Br. 50–51. But petitioner has not advanced such a "categorical[]" position.

The focus of the § 1391(b)(2) inquiry ordinarily should be the defendant's alleged conduct. Pet. Br. 45. This makes sense given the statute's use of "omissions," which can refer only to the defendant's conduct, *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995), as well as the defendant-protective purpose of venue provisions, *Leroy*, 443 U.S. at 183–84. In many intentional-tort cases, like this one, the only "events or omissions giving rise to the claim" will involve the defendant's conduct. In such cases, the defendant's conduct will be the exclusive focus of the inquiry by operation of the statutory text.

As petitioner has explained, however, the defendant's conduct need not be the exclusive focus in *every* case. Pet. Br. 52. There are circumstances in which something other than the defendant's conduct could be an "event . . . giving rise to a claim." *Id.* at 52–53. But the plaintiff must point to *some* event or omission giving rise to the claim that occurred in her chosen forum.

Respondents' hypothetical, based on *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), illustrates petitioner's point. Respondents state that "when an insurance company denies a life insurance claim on the grounds that the decedent committed suicide, the alleged suicide is plainly part of the 'events' giving rise to the claim of breach of contract,

even though it is not an element of the claim and does not involve conduct by the defendant." Resp. Br. 51. This is entirely consistent with petitioner's position, because the alleged suicide would be an event giving rise to the claim. It is also irrelevant, because neither the Ninth Circuit nor respondents have identified any analogous "event" that occurred in Nevada and gave rise to *their* claims.

Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co., 529 U.S. 193 (2000), on which respondents rely, is similarly unhelpful. There, a plaintiff challenged an arbitration award arising out of a construction dispute. The Court observed that venue was proper where the contract was supposed to have been performed, because venue lies where "a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated." *Id.* at 198. The performance (or non-performance) of the construction contract was an "event[] or omission[] giving rise to the claim." Here, by contrast, no such event or omission occurred in Nevada.

2. Respondents similarly mischaracterize petitioner's position in contending that "[t]here is no reason to think that Congress intended to categorically preclude venue in the district of injury." Resp. Br. 57. Petitioner has not advanced this "categorical[]" rule either. In many cases, the defendant's conduct and the plaintiff's injury occur in the same place, and venue in the district of injury is of course not precluded. But even where the defendant's conduct and the plaintiff's injury occur in different districts, there are cases where the plaintiff's injury can be described as an "event[] or omission[] giving

rise to the claim [that] occurred" in the forum district. Petitioner explained that in a suit alleging that a product malfunctioned and caused physical injury, that incident could constitute an event occurring in that district that gave rise to the claim and thus justifies laying venue there. Pet. Br. 52. But if the plaintiff lived in a different district and felt the effects of that event there—long-lasting pain and suffering and reduced earning capacity, for example—venue would not be proper there. The plaintiff may have suffered a substantial part of her injury in her home district, but feeling the effects there of an event that occurred elsewhere would not constitute an event occurring in her home district that gave rise to the claim—just as respondents' ongoing inability to use their cash cannot be described as an event that occurred in Nevada. See U.S. Br. 28–30.[3]

3. Respondents finally argue that petitioner raises a "fact-bound challenge" that merely seeks review of the Ninth Circuit's "weighing of the relevant considerations in the context of this one particular case" and "does not warrant this Court's review." Resp. Br. 50. Not so. The Ninth Circuit erroneously found venue proper here because it applied the wrong *legal* standard. Under the correct standard, the location of the injury is not a "relevant consideration[]" to be weighed in a particular case unless the

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[3] Respondents also gain nothing by invoking *Calder* in their venue argument. Resp. Br. 57–58. Contrary to respondents' suggestion, venue would have been proper in Jones's home district under the current version of § 1391(b)(2) because the distribution of the challenged article in that district was an event that occurred there and gave rise to her claim.

injury is an "event" that "occurred" in the forum district. In any case, however, respondents' assertion is a peculiar one to find in a merits brief. That a legal issue may require applying the law to the facts is not an argument why respondents should prevail.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 12-574

In the Supreme Court of the United States

ANTHONY WALDEN, PETITIONER

v.

GINA FIORE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

Petitioner is a local Georgia police officer who was deputized as an agent of the Drug Enforcement Administration and stationed at an airport in Atlanta, Georgia. Respondents are professional gamblers who maintain a residence in Nevada. This *Bivens* case arises out of petitioner's seizure, and the government's subsequent delay in returning, $97,000 in cash that respondents were carrying through the Atlanta airport en route to Las Vegas. The questions presented are as follows:

1. Whether a federal district court in Nevada has personal jurisdiction over petitioner.

2. Whether, for purposes of establishing venue under 28 U.S.C. 1391(b)(2), "a substantial part of the events or omissions giving rise to [respondents'] claim[s]" can be said to have "occurred" in the District of Nevada.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
I. The federal district court in Nevada cannot exercise personal jurisdiction over petitioner 10
A. A Nevada state court could not exercise jurisdiction over petitioner consistent with the Fourteenth Amendment's Due Process Clause 12
B. Adoption of the court of appeals' analysis would have significant adverse consequences for many federal employees 18
II. The District of Nevada is not a proper venue under 28 U.S.C. 1391(b)(2) 22
A. The court of appeals' decision on venue cannot be reconciled with this Court's precedents 23
B. No "substantial part" of the "events" or "omissions" "giving rise to" respondents' claims "occurred" in Nevada 27
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Anderson v. *Creighton*, 483 U.S. 635 (1987) 19
Asahi Metal Indus. Co. v. *Superior Court*, 480 U.S. 102 (1987) 11, 14, 16
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 1
Burger King Corp. v. *Rudzewicz*, 471 U.S. 462 (1985) 12, 14, 16, 19
Burnham v. *Superior Court*, 495 U.S. 604 (1990) 30

Cases—Continued: Page

Calder v. *Jones*, 465 U.S. 783 (1984) 5, 13, 14, 15, 16
Cottman Transmission Sys., Inc. v. *Martino*, 36 F.3d 291 (3d Cir. 1994) 24, 32
Falkowski v. *EEOC*, 764 F.2d 907 (D.C. Cir. 1985), cert. denied, 478 U.S. 1014 (1986) 20
Goodyear Dunlop Tires Operations, S.A. v. *Brown*, 131 S. Ct. 2846 (2011) 10, 12, 13, 18
Gulf Ins. Co. v. *Glasbrenner*, 417 F.3d 353 (2d Cir. 2005) 26, 30, 32
Hanson v. *Denckla*, 357 U.S. 235 (1958) 14, 16
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 21
Helicopteros Nacionales de Colombia, S.A. v. *Hall*, 466 U.S. 408 (1984) 13, 16
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 12
J. McIntyre Mach. Ltd. v. *Nicastro*, 131 S. Ct. 2780 (2011) 11, 13, 28
Jenkins Brick Co. v. *Bremer*, 321 F.3d 1366 (11th Cir. 2003) 31
Keeton v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984) 13, 18
Kulko v. *Superior Court*, 436 U.S. 84 (1978) 16
Leroy v. *Great W. United Corp.*, 443 U.S. 173 (1979) .....*passim*
Noxell Corp. v. *Firehouse No. 1 Bar-B-Que Rest.*, 760 F.2d 312 (D.C. Cir. 1985) 30
Omni Capital Int'l, Ltd. v. *Rudolf Wolff & Co.*, 484 U.S. 97 (1987) 10, 11
Rush v. *Savchuk*, 444 U.S. 320 (1980) 13, 18
Shaffer v. *Heitner*, 433 U.S. 186 (1977) 13
Sinochem Int'l Co. v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007) 12

Cases—Continued: Page

Stafford v. *Briggs*, 444 U.S. 527 (1980) 21
Woodke v. *Dahm*, 70 F.3d 983 (8th Cir. 1995) 29
World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286 (1980) 12, 13, 15, 16, 18

Constitution, statutes, regulation and rules:

U.S. Const.:
Amend IV 4, 6, 7, 11
Amend V (Due Process Clause) 11
Amend XIV (Due Process Clause) 11, 12
Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, Title II, 125 Stat. 762:
§ 202, 125 Stat. 763 22
§ 205, 125 Stat. 764-765 22
Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Title III, § 311, 104 Stat. 5114 ..... 25, 29
Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 5, 90 Stat. 2897 (28 U.S.C. 1391(f)(1)) 26
15 U.S.C. 22 11
15 U.S.C. 78aa (Supp. V 2011) 11
18 U.S.C. 981(b)(3) 31
18 U.S.C. 983(f)(3)(A) 31
18 U.S.C. 1965 11
28 U.S.C. 1391(a) (1988) 29
28 U.S.C. 1391(b) (1964) 23
28 U.S.C. 1391(b) (1976) 23
28 U.S.C. 1391(b) 29
28 U.S.C. 1391(b)(2) ..... *passim*
28 U.S.C. 1391(b)(3) (Supp. V 2011) 30

Statute, regulation and rules—Continued: Page

Nev. Rev. Stat. Ann. § 14.065(1) (LexisNexis 2008) 10
28 C.F.R. 50.15 19
Fed. R. Civ. P.:
Rule 4(k) 11
Rule 4(k)(1)(A) 10, 11
Rule 4(k)(1)(C) 11
Rule 4(k)(2) 11
Fed. R. Crim. P. 41(g) 31

Miscellaneous:

ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969) 26
H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990) 25, 26
Report of the Federal Courts Study Committee (Apr. 2, 1990) 25, 26
14D Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2007) 26, 30

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the territorial limits on where a plaintiff may file an action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against a federal law enforcement officer stationed at one of our Nation's airports. The court of appeals' decision has serious implications for all law enforcement officers who serve the Nation's transportation hubs and interact with travelers from each of the 50 States, as well as the District of Columbia, the Commonwealth of Puerto Rico, and other territories or possessions of the United States, on a daily basis. The United States therefore has a substantial interest in the proper resolution of this case.

STATEMENT

1. Petitioner is a police officer for the City of Covington, Georgia, who was deputized to work as an agent of the Drug Enforcement Administration (DEA) at the Atlanta Hartsfield-Jackson Airport. J.A. 13-14 ¶ 3, 39-40 ¶¶ 2-4. Respondents are professional gamblers who travel as part of their work and who maintained residences in California and Nevada. J.A. 13-15 ¶¶ 2, 8, 10, 18 ¶ 37. This case arises out of petitioner's seizure, and the government's subsequent delay in returning, cash that respondents were carrying through the Atlanta airport en route to Las Vegas.[1]

In July 2006, respondents left Las Vegas to begin a "gambling excursion." J.A. 14-15 ¶¶ 9, 11. Respondents traveled to Atlantic City, New Jersey; to San Juan, Puerto Rico; and then back to Las Vegas. J.A. 15 ¶ 11. On August 8, 2006, respondents arrived at the San Juan airport for their return flight, which had a connection in Atlanta, Georgia. J.A. 15 ¶ 13, 19 ¶ 43. Between them, respondents were carrying approximately $97,000 in cash in their carry-on bags and in their pockets. J.A. 15-16 ¶¶ 13, 17.

At the San Juan airport, Transportation Security Administration agents searched respondents and their carry-on bags. J.A. 16-17 ¶¶ 21-29. Upon discovering the cash, three DEA agents questioned respondents. J.A. 17-18 ¶¶ 30-38. Respondents produced California drivers' licenses as identification, informed the federal agents that they had residences in both California and Las Vegas, and explained that they had been gambling at a San Juan casino. J.A. 18 ¶¶ 35-37. Respondents

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[1] The allegations in respondents' first amended complaint were taken as true for the limited purpose of deciding petitioner's motion to dismiss. See Pet. App. 2a n.2, 68a.

were permitted to board the plane, but were told that they might be asked further questions. J.A. 19 ¶ 39.

When respondents arrived at the Atlanta airport for their connection, petitioner (who had been informed of their impending arrival by San Juan officials) met them at the departure gate. J.A. 19 ¶ 46, 41-42 ¶¶ 13-14. Petitioner asked respondents for identification, and they again produced their drivers' licenses. J.A. 42 ¶ 15. After a drug-sniffing dog alerted to the presence of contraband in respondents' bags (a false alert according to respondents), petitioner seized the cash. J.A. 21-22 ¶¶ 54-60, 65. Petitioner told respondents that the money would be returned if they produced documentation demonstrating that the cash was legitimate. J.A. 22 ¶ 62.

Respondents boarded the flight to Las Vegas; petitioner immediately transferred the funds to a secure location; and the matter was referred to the DEA in Virginia for further investigation. J.A. 25 ¶ 76, 42 ¶ 17. The next day, petitioner received a call from respondents' attorney requesting that the seized funds be returned. J.A. 43 ¶ 18. On August 30, 2006, and on September 15, 2006, petitioner received documentation sent by respondents' counsel in Las Vegas, which purported to establish the legitimacy of the funds. J.A. 23-24 ¶¶ 70-71, 43 ¶ 18. Petitioner never contacted respondents' counsel or "anyone else in Nevada" regarding respondents. J.A. 43 ¶ 19.

Respondents allege that petitioner subsequently prepared an "affidavit" in support of a forfeiture action in Georgia and forwarded that affidavit to the United States Attorney's Office in Georgia. J.A. 25 ¶ 80. According to respondents, the affidavit made false statements regarding the encounter at the airport and omit-

ted exculpatory evidence. J.A. 26-30 ¶¶ 81-87.[2] No forfeiture complaint was filed and, on March 1, 2007, the $97,000 in cash was returned to respondents in Las Vegas. J.A. 31 ¶¶ 94-95.

2. Respondents filed this *Bivens* suit in the United States District Court for the District of Nevada against petitioner and three unnamed DEA agents or attorneys.[3] Respondents alleged that petitioner and the other defendants had violated their Fourth Amendment rights by (i) initially seizing the cash without probable cause; (ii) retaining the funds after concluding they were legitimate; (iii) drafting and forwarding for prosecution a probable cause affidavit that knowingly contained false statements; (iv) willfully seeking to prosecute the funds while withholding exculpatory evidence; and (v) willfully withholding that exculpatory evidence from the United States Attorney's Office. J.A. 33-34 ¶ 102.

Petitioner moved to dismiss the complaint for lack of personal jurisdiction and improper venue. In support of that motion, petitioner submitted a sworn declaration attesting that he is a resident of Georgia who has never been to Nevada, never owned property in Nevada, and never conducted personal business in Nevada, J.A. 41 ¶¶ 7-11; that all of his interactions with respondents had occurred at the Atlanta airport, J.A. 42 ¶ 14; that when asked for identification, respondents had produced drivers' licenses not issued by the State of Nevada, J.A. 42 ¶ 15; that he had never contacted respondents' counsel or anyone else in Nevada regarding respondents, J.A. 43 ¶ 19; and that the cash had been immediately transferred to a secure location for processing, depriving him

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[2] The allegedly false affidavit is not in the record. Pet. App. 93a.

[3] The other defendants were never served and were not appellants below. Pet. App. 7a n.8.

of any authority to return the money, J.A. 42-43 ¶ 17; see Pet. App. 11a n.11 (federal regulations confirm petitioner did not have legal authority to return the seized funds).

The district court granted petitioner's motion to dismiss for lack of personal jurisdiction without addressing venue. Pet. App. 65a-74a. Applying a "three part 'effects test' derived from [this] Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984)," the court concluded that "the search of [respondents'] luggage and seizure of their currency" were "expressly aimed at Georgia, not Nevada." *Id.* at 70a-71a. The court also concluded that petitioner's failure to return the seized currency did not qualify as an "affirmative, intentional act expressly aimed at Nevada" because petitioner "was not in possession of the currency for more than a short period of time after the seizure, and had no legal authority to return it." *Id.* at 71a n.1. The court acknowledged that petitioner's alleged acts may have "caused harm to [respondents] in Nevada," and that petitioner "may have known that [respondents] lived in Nevada." *Id.* at 72a. The court determined, however, that "this alone does not confer jurisdiction." *Ibid.*

3. The court of appeals reversed and remanded. Pet. App. 1a-64a.

a. The court of appeals first addressed personal jurisdiction. Pet. App. 8a-39a. Like the district court, the court of appeals applied a "three-part [effects] test" derived from *Calder*. *Id.* at 16a. The court did not dispute that the initial airport search and seizure "was expressly aimed at Georgia, not Nevada." *Id.* at 17a. Instead, the court focused on what it called "the false affidavit/forfeiture proceeding aspect of th[e] case," *i.e.*, petitioner's alleged submission of "a false and mis-

leading probable cause affidavit" and referral of "the case for forfeiture proceedings in the absence of probable cause." *Id.* at 15a, 17a.

With respect to that "aspect" of the case, the court of appeals found "strong" indications that petitioner had "expressly target[ed]" respondents "in Nevada." Pet. App. 20a. The court explained that petitioner had known "at some point *after* the seizure but *before* providing the alleged false probable cause affidavit, that [respondents] had a significant connection to Nevada." *Ibid.* And the court found that "[t]he delay in returning the funds to [respondents] in Las Vegas caused them foreseeable harm in Nevada." *Id.* at 28a.

The court of appeals also concluded that the exercise of personal jurisdiction over petitioner would not be unreasonable. Pet. App. 30a-36a. In weighing the relevant factors, the court thought it significant that, "[a]s an airport law enforcement officer, [petitioner] was necessarily aware that his actions would often have their principal impact outside of Georgia, as many of the people he investigates are in Atlanta only on their way to somewhere else." *Id.* at 31a. As for the burden of litigating in Nevada, the court acknowledged that petitioner's argument "might well have [had] force" if he had been "a local small business person or an airport employee." *Id.* at 32a. The court concluded, however, that federal agents (like petitioner) are different because "[w]hen federal employees are sued under *Bivens*, the government, as a rule, provides for their defense, and, ultimately, indemnifies them." *Ibid.*[4]

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[4] Having found that the Nevada district court had personal jurisdiction over petitioner based on the false-affidavit aspect of the case, the court of appeals suggested that the district court could exercise pendent personal jurisdiction over respondents' Fourth Amendment

Finally, the court of appeals rejected petitioner's argument that venue was improper under 28 U.S.C. 1391(b)(2). Pet. App. 40a-42a. The court held that the applicable venue requirements were satisfied because "[a]ll the economic injuries suffered by [respondents] were realized in Nevada, including their loss of use and interest on the funds for nearly seven months," and because "[t]he facts concerning the origin and legitimacy of the $97,000 are also connected to Nevada." *Id.* at 41a.

b. Judge Ikuta dissented. Pet. App. 48a-64a. In her view, the "only claim in th[e] complaint is a Fourth Amendment claim for seizure of property. There is no claim that [petitioner's] preparation of the allegedly fraudulent affidavit violated [respondents'] Fourth Amendment rights, and it is doubtful that such a constitutional tort even exists." *Id.* at 55a (footnote omitted). As for the Fourth Amendment seizure claim, Judge Ikuta concluded that petitioner did not "purposefully direct[]" his actions at respondents in Nevada because petitioner "knew only that [respondents] had California driver's licenses and were headed to Las Vegas" when he seized the cash. *Id.* at 53a-54a.

4. The court of appeals denied rehearing en banc, with eight judges dissenting in two separate opinions. Pet. App. 75a-95a.[5] The panel majority and dissent amended their respective opinions, each adding a "postscript" to respond to the en banc dissents. *Id.* at 43a-47a, 59a-64a.

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challenge to the initial seizure of the funds. The court remanded to the district court for further consideration of that issue. Pet. App. 38a-39a.

[5] Petitioner was represented by private counsel before the en banc court of appeals and is represented by private counsel in this Court.

SUMMARY OF ARGUMENT

I. The Nevada district court was not authorized to exercise personal jurisdiction over petitioner in this case. Under this Court's precedents, petitioner could appropriately be subjected to the Nevada court's jurisdiction only if, in performing the actions that respondents allege to be wrongful, petitioner purposefully directed his activities at the forum State. In this case, the conduct for which petitioner has been sued occurred entirely within Georgia.

The court of appeals attached significance to the fact that respondents experienced economic harm in Nevada when they returned to that State without the seized cash. In some circumstances, the evident likelihood of harm within the forum State may support a conclusion that the defendant purposefully directed his activities there. In this case, however, the initial deprivation of the funds occurred in Georgia. Neither respondents' *continued* lack of access to the money while they were physically present in Nevada, nor petitioner's awareness that respondents intended to travel to Nevada after their money was seized, establishes that petitioner directed his activities at that State.

The court of appeals' analysis would have particularly deleterious consequences for federal employees, like petitioner, who regularly interact with residents of many different States. Under the court of appeals' approach, a federal employee who is alleged to have performed his duties in an unconstitutional manner can be sued in any State where the plaintiff chooses to travel, at least so long as (i) the plaintiff makes her destination known to the employee, and (ii) her alleged injury remains unredressed when she reaches that destination. The court viewed that prospect as acceptable because (in

the court's view) federal employees are routinely given Justice Department representation, and are indemnified for any adverse judgment, when they are sued under *Bivens*. That analysis is flawed in multiple respects and would have serious adverse consequences for the federal government and its work force.

II. Under 28 U.S.C. 1391(b)(2), the propriety of venue in this case depends on whether "a substantial part of the events or omissions giving rise to" respondents' claims "occurred" in the District of Nevada. The court of appeals erred in finding venue proper in that district. This Court has long made clear that limitations on venue are intended "to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 184 (1979). That purpose is directly implicated here.

In this case, the seizure of the cash and petitioner's alleged preparation of a false affidavit both occurred in Georgia. Although the court of appeals found that respondents "suffered harm in Nevada," Pet. App. 41a, Section 1391(b)(2) does not identify the place of harm as a permissible venue for a federal civil action. In this case, moreover, respondents "suffered harm in Nevada" only in the sense that they *remained* without the $97,000 for a period of time after they returned to that State. That seven-month-long lack of access is not plausibly described as either an "event" or an "omission." To treat it as such for federal venue purposes would not only be countertextual; it would enable plaintiffs to lay venue in their own districts of residence in virtually every case, thus subverting the defendant-protective purpose of venue limitations.

The court of appeals also identified some "events," such as respondents' initial departure from Las Vegas

with cash in hand, and the post-seizure transmittal of documentation from respondents' counsel, that "occurred" in Nevada and had a tangential connection to petitioner's alleged unconstitutional conduct. Those events do not support venue in Nevada, however, because they are irrelevant to the disposition of respondents' constitutional claims and therefore are not events "giving rise to" those claims. Section 1391(b)(2), moreover, authorizes venue only in "a judicial district in which a *substantial* part of the events or omissions giving rise to the claim occurred." 28 U.S.C. 1391(b)(2) (emphasis added). Even if one or more of the Nevada connections identified by the court of appeals were properly viewed as "events" "giving rise to" respondents' claims, they are an insubstantial part of the overall set of events and omissions on which respondents' claims are based.

ARGUMENT

I. THE FEDERAL DISTRICT COURT IN NEVADA CANNOT EXERCISE PERSONAL JURISDICTION OVER PETITIONER

The Federal Rules of Civil Procedure prescribe territorial limits on the effective service of a summons by a federal district court. Under Rule 4(k)(1)(A), "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant * * * who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." Fed. R. Civ. P. 4(k)(1)(A); see *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (*Omni Capital*). Nevada's long-arm statute, in turn, allows the exercise of personal jurisdiction to the full extent permitted by the Constitution. See Nev. Rev. Stat. Ann. § 14.065(1) (LexisNexis 2008); *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2850 (2011) (*Goodyear*)

("A state court's assertion of jurisdiction" is "subject to review for compatibility with the Fourteenth Amendment's Due Process Clause."). Whether petitioner was properly served under Rule 4(k)(1)(A) therefore turns on whether a Nevada state court could exercise jurisdiction over petitioner consistent with the Fourteenth Amendment's Due Process Clause.[6] On the facts pre-

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[6] The United States has an interest in ensuring that claims under federal law brought in courts of the United States are not unduly constrained by a personal jurisdiction analysis that is narrowly focused on the fairness of subjecting the defendant to the sovereign power of a particular State, instead of the Nation as a whole. See Fed. R. Civ. P. 4(k)(2); Fed. R. Civ. P. 4(k) advisory committee's note (1993). In the service-of-process provision at issue in this case, Fed. R. Civ. P. 4(k)(1)(A), Congress has elected to limit a federal court's exercise of personal jurisdiction to "the jurisdiction of a court of general jurisdiction in the state where the district court is located" which, in turn, focuses the inquiry on the Fourteenth Amendment's Due Process Clause. But Congress can by law provide otherwise. For example, the Civil Rules also provide that service of process establishes personal jurisdiction "when authorized by a federal statute," Fed. R. Civ. P. 4(k)(1)(C), and Congress has in numerous federal statutes provided for nationwide service of process, see, *e.g.*, 15 U.S.C. 22; 15 U.S.C. 78aa (Supp. V 2011); 18 U.S.C. 1965. A due process inquiry under those distinct provisions would arise under the Fifth Amendment and must be judged by reference to the fairness of subjecting the defendant to the sovereign powers of the United States, rather than the sovereign power of a particular State. In prior cases, the Court has appropriately reserved the question whether "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits." *Omni Capital*, 484 U.S. at 102 n.5; see *J. McIntyre Mach., Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2790 (2011) (plurality opinion); *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 113 n.* (1987) (opinion of O'Connor, J.). The same approach is warranted here.

sented here, a Nevada state court could not constitutionally exercise personal jurisdiction over petitioner.[7]

A. A Nevada State Court Could Not Exercise Jurisdiction Over Petitioner Consistent With The Fourteenth Amendment's Due Process Clause

"The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291 (1980). "[A] State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Goodyear*, 131 S. Ct. at 2853 (brackets, citation, and internal quotation marks omitted). This limitation on a state court's authority "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471-472 (1985) (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945)). It "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S.

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[7] This Court generally, though not invariably, considers questions of personal jurisdiction before addressing venue. See *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 180 (1979). Both are potential threshold non-merits grounds of decision, however, and the Court therefore may address them in whichever order it deems appropriate. See *id.* at 180-181; *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007); Pet. Br. 16.

at 297. "And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292.

1. This case presents a question of "specific jurisdiction," which the Court has described as the exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984) (*Helicopteros*).[8] Specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 131 S. Ct. at 2851 (citation omitted).

The determination whether a state court may exercise specific jurisdiction in a particular case turns on the "relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977); accord *J. McIntyre Mach., Ltd.* v. *Nicastro*, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring in the judgment); *id.* at 2798 (Ginsburg, J., dissenting); *Helicopteros*, 466 U.S. at 414; *Calder* v. *Jones*, 465 U.S. 783, 788 (1984); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984); *Rush* v. *Savchuk*, 444 U.S. 320, 327 (1980). The required "substantial connection" between the defendant and the forum State exists only if the defendant has "purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State,

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[8] "General jurisdiction," in contrast, is the exercise of "personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.9. Respondents do not argue that petitioner is subject to the general jurisdiction of Nevada courts.

thus invoking the benefits and protections of its laws," *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958), or has "purposefully directed" his conduct "toward the forum State," *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 112 (1987) (*Asahi*) (opinion of O'Connor, J.). See *Burger King*, 471 U.S. at 475-476. Requiring such purposeful conduct "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Id.* at 475 (citations omitted).

2. This Court's decision in *Calder* (on which the court below relied) fits comfortably within that framework. In *Calder*, a popular entertainer who lived and worked in California brought a defamation action in California state court against the author and editor of a *National Enquirer* article. 465 U.S. at 784-785. The article was written and edited in Florida, but was widely circulated in California. *Id.* at 785-786. The Court unanimously held that personal jurisdiction was proper in California.

The Court based that holding on three primary facts. First, California was the "focal point" of the story. *Calder*, 465 U.S. at 789. The article "concerned the California activities of a California resident" and was "drawn from California sources." *Id.* at 788. Second, California was the "focal point" of the harm suffered. *Id.* at 789. Plaintiff, an "entertainer whose television career was centered in California," had felt the "brunt of the harm, in terms both of [her] emotional distress and the injury to her professional reputation," in California. *Id.* at 788-789. Third, the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California," since the defendants had written and edited an article that "they knew would have a potentially devastating

impact" on plaintiff. *Id.* at 789. The defendants also "knew that the brunt of that injury would be felt by [plaintiff] in the State in which she lives and works and in which the National Enquirer has its largest circulation." *Id.* at 789-790. The Court concluded that, because the defendants in *Calder* had "expressly aimed" their activities at California, they could "reasonably anticipate being haled into court there." *Ibid.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

3. The court of appeals misapplied this Court's precedents, including *Calder*, in holding that the Nevada district court could exercise personal jurisdiction over petitioner in this case.

Petitioner is a local police officer in Georgia who was deputized as a DEA agent and assigned to an airport in Georgia. He questioned respondents in Georgia; searched their bags in Georgia; and seized their cash in Georgia. He then (allegedly) executed a "false probable cause affidavit" in Georgia and forwarded it to a United States Attorney's Office in Georgia to initiate a forfeiture proceeding in Georgia.[9] And he never contacted respondents (or their attorney) outside of Georgia. See pp. 2-5, *supra*.

The purported "contacts" between petitioner and Nevada on which the court of appeals relied are patently insufficient to subject petitioner to the jurisdiction of a

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[9] Respondents do not allege that petitioner was anywhere other than in Georgia when he prepared the allegedly false affidavit and forwarded it to a United States Attorney's Office in Georgia for possible use in a Georgia forfeiture proceeding. J.A. 25 ¶ 80, 29-30 ¶¶ 87-89. The first amended complaint alleges that "defendant C" and petitioner "worked together" to provide the "affidavit" "for forwarding to the U.S. attorney in Georgia." J.A. 25 ¶ 80; see J.A. 14 ¶ 7 (describing "Defendant C" as "an attorney or other person employed in Quantico, Virginia").

Nevada court. First, respondents' Las Vegas attorney contacted petitioner in Georgia on three occasions (by phone and by mail). Pet. App. 21a. That interaction did not reflect petitioner's "purposeful" decision to establish contact with Nevada, but rather was the "unilateral" act of respondents' own representative. *Burger King*, 471 U.S. at 475. It is well settled that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson*, 357 U.S. at 253; accord *Helicopteros*, 466 U.S. at 416-417; *World-Wide Volkswagen*, 444 U.S. at 298; *Kulko* v. *Superior Court*, 436 U.S. 84, 93-94 (1978).

Second, the court of appeals relied in part on respondents' allegation that some of the cash seized in Georgia had "originated" in Las Vegas. Pet. App. 20a-21a. An individual does not "purposefully direct[]" (*Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.)) or "expressly aim[]" (*Calder*, 465 U.S. at 789) his activities at a particular State, however, simply by seizing property that was *previously* in that State. That is particularly clear in the present case, where the $97,000 that petitioner seized also included currency respondents had acquired in Atlantic City and San Juan. *E.g.*, J.A. 14-15 ¶¶ 9-11, 24 ¶ 72. The fact that respondents may have possessed some of those funds when they left Nevada is the sort of "random," "fortuitious," and "attenuated" contact that has no constitutional significance. *Burger King*, 471 U.S. at 475; see *World-Wide Volkswagen*, 444 U.S. at 295.

Third, the seized funds were eventually returned to respondents in Las Vegas. Pet. App. 22a. But respondents' claims do not "aris[e] out of or relate[] to" the *return* of the seized funds. *Helicopteros*, 466 U.S. at 414

n.8. It was petitioner's *failure to return* the seized funds (and the initial seizure itself) that gave rise to respondents' claims. Moreover, the funds were returned by someone other than petitioner at the direction of a Georgia Assistant United States Attorney, see J.A. 42-43 ¶ 17 (petitioner lacked authority to return cash after seizure); Pet. App. 11a n.11 (same); J.A. 31 ¶ 94, and presumably the funds were sent to Nevada (rather than to respondents' separate residence in California) because respondents chose to have the funds sent there. For all those reasons, the return of the funds does not represent the sort of contact between petitioner and the forum State that could justify the exercise of personal jurisdiction.

Fourth, the court of appeals found that petitioner's alleged wrongful conduct "caused foreseeable harm in the forum." Pet. App. 27a; see *id.* at 27a-28a. In some circumstances, as in *Calder*, the evident likelihood of harm in the forum State may support a conclusion that the defendant "purposely directed" his activities there. Here, however, respondents' initial economic injury occurred in Georgia when their cash was seized. The harm they suffered in Nevada was not any new economic loss, but simply the continuing effect of the prior seizure, and respondents experienced that harm in Nevada only because they chose to travel and remain there. Although petitioner knew that respondents were en route from San Juan to Las Vegas, see *id.* at 28a, his awareness of that fact provides no basis for concluding that petitioner "purposefully directed" his activities at that State.[10] A defendant's "amenability to suit" does

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[10] Petitioner's asserted awareness of respondents' "significant connection" to Nevada is based on the facts that respondents were en route to Las Vegas; that part of the seized currency allegedly "origi-

not travel with a mobile plaintiff, any more than it travels with mobile chattel. *World-Wide Volkswagen*, 444 U.S. at 296.

The fact that respondents maintained a Nevada residence does not alter that conclusion. A plaintiff's State of residence is relevant only insofar as it "enhance[s] defendant's contacts with the forum," *Keeton*, 465 U.S. at 780—and, here, there is nothing to "enhance." See *Goodyear*, 131 S. Ct. at 2857 n.5 ("When a defendant's act outside the forum causes injury in the forum * * * a plaintiff's residence in the forum may *strengthen* the case for the exercise of *specific jurisdiction*.") (first emphasis added); *Rush*, 444 U.S. at 329, 332 (plaintiff's contacts with forum cannot be decisive in assessing defendant's due process rights). Petitioner's allegedly wrongful actions were directed at the money in Georgia, not at respondents in Nevada.

B. Adoption Of The Court Of Appeals' Analysis Would Have Significant Adverse Consequences For Many Federal Employees

Many federal law enforcement officers and other federal employees interact on a regular basis with large numbers of individuals with diverse residences. The present case, in which a local police officer deputized as a federal agent seized property from out-of-State residents at a transportation hub, involves a relatively common set of facts. Under the court of appeals' approach, a federal employee who is alleged to have performed his duties in an unconstitutional manner can be

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nated" from and was "destin[ed]" for Las Vegas; and that respondents' lawyer later sent documentation from Las Vegas. Pet. App. 20a-21a. Respondents do not allege that petitioner knew (at any time) that they maintained a second residence in Nevada. *Id.* at 51a.

sued under *Bivens* in any State where the plaintiff chooses to travel, at least so long as (i) the plaintiff makes her destination known to the employee, and (ii) her alleged injury remains unredressed when she reaches that destination.[11]

Far from appreciating the potential deleterious consequences of its holding for federal employees generally, the court of appeals treated petitioner's federal-employee status as a factor *supporting* the Nevada court's exercise of personal jurisdiction. The court acknowledged that petitioner's objection to defending this suit in Nevada "might well have force" if petitioner were "a local small business person or an airport employee." Pet. App. 32a. The court stated, however, that "[w]hen federal employees are sued under *Bivens*, the government, as a rule, provides for their defense, and, ultimately, indemnifies them." *Ibid.* The court concluded that "the traditional weight given to a defendant's inconvenience in having to litigate in a forum in which he has few contacts does not apply in this case, given that [petitioner] can be represented just as easily by the United States Attorney's Office in Nevada as by the Office in Georgia." *Id.* at 37a-38a. That analysis is wrong in at least three respects.

First, the court's premise is mistaken. The Department of Justice's guidelines make clear that the government's representation and indemnification of *Bivens* defendants are discretionary. See 28 C.F.R. 50.15; *An-*

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[11] To be sure, there are still the "reasonableness" factors, but this Court has said that only in a "compelling case" would the "minimum requirements inherent in the concept of 'fair play and substantial justice' * * * defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." *Burger King*, 471 U.S. at 477-478 (citation omitted).

derson v. *Creighton*, 483 U.S. 635, 641 n.3 (1987); *Falkowski* v. *EEOC*, 764 F.2d 907, 910-911 (D.C. Cir. 1985), cert. denied, 478 U.S. 1014 (1986). Indeed, petitioner himself is represented by private counsel in the proceedings before this Court, as he was before the en banc court of appeals.

Second, even when the defendant employee in a particular *Bivens* suit is given Justice Department representation and is indemnified for any money judgment, the burden on the employee of defending in a distant forum may still be substantial. The defendant's personal presence may be required, for example, at pre-trial and/or trial proceedings. Thus, although the presence of a United States Attorney's Office in every federal judicial district may reduce the burden on the defendant's *lawyers* that trial of this case in Nevada would entail, it provides no sound reason for depriving petitioner himself of the protections to which other out-of-State defendants would be entitled.

Third, this Court has never suggested that established minimum-contacts requirements may be dispensed with or diluted, and a defendant forced to defend against suit in a State with which he has formed no voluntary connection, simply because the burdens associated with a particular suit are expected to be manageable. To be sure, limitations on States' exercise of personal jurisdiction over out-of-State defendants serve in part to protect defendants against inordinate burdens and inconvenience. See pp. 12-13, *supra* (noting purposes served by constitutional limitation on state authority). In applying personal-jurisdiction principles to any particular case, however, the dispositive question is not how great the burden on the particular defendant is likely to be, but whether the defendant has subjected himself to

that burden by engaging in voluntary conduct directed at the forum State. Petitioner's potential access to Justice Department representation and indemnification for any adverse judgment is simply irrelevant to that question.

In *Stafford* v. *Briggs*, 444 U.S. 527, 544 (1980), this Court held that a venue provision authorizing nationwide service of process on federal officers did not apply to "[s]uits for money damages for which an individual officeholder may be found personally liable." The Court explained that, if the provision were construed to encompass such suits, actions could "be brought against these federal officers while in Government service—and could be pressed even after the official has left federal service—in any one of the 95 federal districts covering the 50 states and other areas within federal jurisdiction." *Ibid.* The Court declined to "place federal officers, solely by reason of their Government service, in a very different posture in personal damages suits from that of all other persons." *Ibid.*

Like *Stafford*, this case involves a federal officer sued "for money damages for which an individual officeholder may be found personally liable." 444 U.S. at 544. The threat of having to defend a lawsuit in a distant forum—far from home, family, and work—could deter "able citizens from acceptance of public office," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982), and could interfere with their federal mission. That risk is heightened for the DEA and other federal agencies that rely on the cooperation of state and local police officers like petitioner to augment multi-agency task forces. The court below, however, avowedly treated petitioner's federal status as a ground for subjecting him to suit in a much broader range of fora than would be permissible if he

were "a local small business person or an airport employee." Pet. App. 32a. That aspect of the court of appeals' analysis is contrary to this Court's precedents and would have deleterious consequences for the federal government and its work force.

II. THE DISTRICT OF NEVADA IS NOT A PROPER VENUE UNDER 28 U.S.C. 1391(b)(2)

The venue provision applicable to this case states that a civil action "not founded solely on diversity of citizenship" may be brought in a judicial district where "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. 1391(b)(2).[12] The court of appeals held that "a substantial part of the events or omissions giving rise to" respondents' claims "occurred" in the District of Nevada because respondents suffered economic "harm" in Nevada, and because other "facts" regarding "the origin and legitimacy of the $97,000" in cash were "connected" to Nevada. Pet. App. 41a. The court of appeals' decision on venue is divorced from the statutory text, inconsistent with congressional intent, and irreconcilable with this Court's decision in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 183-187 (1979).

A. The Court Of Appeals' Decision On Venue Cannot Be Reconciled With This Court's Precedents

1. In *Leroy*, a Texas corporation brought suit in Texas against Idaho officials, challenging an Idaho statute

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[12] In 2011, Section 1391(b) was amended to apply to all civil actions. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, Title II, § 202, 125 Stat. 763. The 2011 amendments are inapplicable here, see *id.* § 205, 125 Stat. 764-765 (applying only to actions commenced after January 6, 2012), but they would not alter the analysis.

that imposed restrictions on takeovers of companies with assets in Idaho. 443 U.S. at 175-177. Relying on the then-current version of 28 U.S.C. 1391(b) (1976), which provided that a suit could be brought in a judicial district "in which the claim arose," the plaintiff argued that "the claim arose" in Texas because it "proposed to initiate its tender offer" in Texas and would feel the "impact" of Idaho's statute there. *Leroy*, 433 U.S. at 186. The Court rejected that argument.

The Court in *Leroy* explained that "the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." 443 U.S. at 183-184. Consistent with that purpose, in federal-question cases, Congress had historically declined to authorize venue in the district in which the plaintiff resided. *Ibid.* Indeed, before 1966, venue in a nondiversity case was generally proper *only* in the district where all of the defendants resided. 28 U.S.C. 1391(b) (1964). When Congress expanded the venue options to include the district in which "the claim arose," its objective was to identify a place more convenient for "both" of the litigants, and for the witnesses—not "to provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts." *Leroy*, 443 U.S. at 185.

The Court in *Leroy* did not dispute that the plaintiff would feel the "impact" of Idaho's statute in Dallas. 443 U.S. at 186. And the Court assumed (without deciding) that a claim could arise in more than one district. *Id.* at 184-185 & n.19. The Court nevertheless found that the plaintiff's "contacts" fell "far short" of establishing a sufficient connection between the "claim" and the Northern District of Texas. *Id.* at 186. A contrary con-

clusion, the Court explained, would subject Idaho officials to "suit in almost every district in the country." *Ibid.* Such an approach would also leave the venue decision "entirely in the hands of plaintiffs"—a result "inconsistent with the underlying purpose" of Section 1391(b). *Ibid.* Because the relevant actions (*i.e.*, the enactment and enforcement of the takeover statute) had been "taken in Idaho by Idaho residents," the claim had "only one obvious locus—the District of Idaho." *Id.* at 185.

2. The Court's reasoning in *Leroy* applies equally here. The entire interaction between petitioner and respondents occurred at the Atlanta airport. That is where respondents were questioned; where their bags were searched; and where the cash was seized. Petitioner then prepared the allegedly false probable cause affidavit and forwarded it to a United States Attorney's Office in Georgia for possible use in a Georgia forfeiture proceeding. See pp. 2-5, *supra*. The government's delay in returning the money, moreover, is properly understood as an "omission" occurring in Georgia. See *Cottman Transmission Sys., Inc.* v. *Martino*, 36 F.3d 291, 295 (3d Cir. 1994) (defendant's "failure to return various materials and failure to remit payments" to plaintiff in Pennsylvania cannot be said to have occurred in Pennsylvania, "[e]ven though the result was [plaintiff's] non-receipt of those items in Pennsylvania").

The only arguable connections between respondents' claims and the District of Nevada do not distinguish this case from *Leroy*. That petitioner's alleged conduct in Georgia had an economic impact on respondents in Nevada falls "far short" of establishing a sufficient connection to the forum district. *Leroy*, 443 U.S. at 186. The fact that "documentation of the legitimacy of the money

was sent" to petitioner in Georgia from respondents' Nevada counsel, Pet. App. 42a, also fails to establish a sufficient link. Venue was deemed improper in *Leroy* even though one of the *defendants* had sent a "telecopy letter" to the plaintiff's "offices in Dallas." 443 U.S. at 177. Treating respondents' own communication as sufficient to establish venue in the district of transmittal "would leave the venue decision entirely in the hands of plaintiffs." *Id.* at 186. And the court of appeals' decision would leave law enforcement officers who work at transportation hubs subject to suit in every judicial district in the Nation. Cf. *ibid.*; Pet. App. 31a & n.21 (noting that the Atlanta airport sees "an average of more than 240,000 passengers a day" and that many of those passengers are "on their way to somewhere else").

3. The court of appeals dismissed *Leroy* as irrelevant because it involved an earlier version of the venue statute. Pet. App. 40a n.23. The subsequent amendment, however, did nothing to undermine *Leroy*'s reasoning or its holding.

In 1990, Congress amended the general venue statute in several respects. See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Title III, § 311, 104 Stat. 5114 (1990 Amendments). *Inter alia*, Congress replaced the language at issue in *Leroy* ("in the judicial district * * * in which the claim arose") with the current formulation (in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred"). The amended statutory language had been recommended by the Federal Courts Study Committee. See H.R. Rep. No. 734, 101st Cong., 2d Sess. 23 (1990) (citing *Report of the Federal Courts Study Committee* 94 (Apr. 2, 1990) (Committee Report)). It had been proposed by the

American Law Institute (ALI) decades earlier. See *ibid.* (citing ALI, *Study of the Division of Jurisdiction Between State and Federal Courts* §§ 1303, 1314 (1969)). And the same statutory language had been adopted by Congress in 1976 for suits against foreign states. *Ibid.* (citing Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 5, 90 Stat. 2897 (now codified at 28 U.S.C. 1391(f)(1)).

The primary purpose of the 1990 amendment was to make clear that venue may be proper in more than one judicial district. See 14D Charles Alan Wright et al., *Federal Practice and Procedure* § 3806.1, at 199 (3d ed. 2007) (Wright) (noting that ALI had "complained as early as 1969 that the 'in which the claim arose' formulation was litigation-breeding, because it implied that there was a unique, best venue for every claim"); Committee Report 94. By authorizing venue in "a" judicial district in which a "substantial part" of the events or omissions giving rise to the claim occurred, Congress "removed much of the ambiguity of the former statute." *Gulf Ins. Co.* v. *Glasbrenner*, 417 F.3d 353, 356 (2d Cir. 2005).

Although the 1990 amendment potentially expanded the number of districts in which venue could be found proper, it did not substantively modify the nexus required between the claim and the judicial district. In particular, the amended language did not suggest that venue could be premised on the plaintiff's own contacts with the forum district. To the contrary, the amended language ("events or omissions giving rise to the claim") made *more explicit* what the *Leroy* Court had already found to be implicit in the pre-amendment version—*i.e.*, that the venue inquiry should ordinarily focus on the allegedly wrongful conduct of the defendant. The 1990

amendment therefore casts no doubt on the continuing vitality of this Court's reasoning and holding in *Leroy*.

B. No "Substantial Part" Of The "Events" Or "Omissions" "Giving Rise To" Respondents' Claims "Occurred" In Nevada

For venue to be proper in the District of Nevada, a (i) "substantial part" (ii) of "the events or omissions" (iii) "giving rise to [respondents'] claim[s]" must have (iv) "occurred" in Nevada. Respondents cannot satisfy those requirements here.

1. The initial seizure of respondents' cash, and the alleged preparation of the false affidavit, were "events" within the meaning of Section 1391(b)(2). Under the plain meaning of the statutory term, however, those events "occurred" outside of Nevada. Petitioner's allegedly wrongful failure to return the money promptly, but see p. 5, *supra* (noting district court's conclusion that petitioner lacked legal authority to return the funds after the initial seizure), is plausibly described as an "omission." Section 1391(b)(2)'s reference to the district where an "omission" "occurred," however, is best read to mean the district where the defendant *ought to have* performed the required action. Given petitioner's apparent presence in Georgia throughout the relevant time period, there is no basis for treating Nevada, or any place other than Georgia, as the district where any wrongful "omission" "occurred."

The court of appeals stated that respondents "suffered harm in Nevada" because "[a]ll the economic injuries suffered by [respondents] were realized in Nevada, including their loss of use and interest on the funds for nearly seven months." Pet. App. 41a. Section 1391(b)(2), however, does not identify the locus of harm as a permissible venue for a federal civil action, but

instead refers to districts where "events" or "omissions" have "occurred." Under no accepted understanding of the word can an event or omission be said to "occur" in every place where its effects are felt. And while respondents' seven-month-long lack of access to the relevant funds may have *resulted* from petitioner's alleged wrongful conduct, the lack of access itself cannot plausibly be described as either an "event" or an "omission."

In stating that respondents "suffered harm in Nevada," Pet. App. 41a, moreover, the court of appeals relied on an expansive conception of the term "suffered." If respondents' Nevada bank accounts had been frozen, respondents would naturally be said to "suffer harm" in Nevada, even if the individual who caused the accounts to be frozen had acted in Georgia. In this case, by contrast, respondents' initial economic injury, like the actions that caused the injury, occurred in Georgia when their cash was seized. Respondents "suffered harm in Nevada" only in the sense that they *remained* without the $97,000 for a period of time after they returned to that State.[13]

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[13] Different and more difficult venue questions may arise when the plaintiff's initial injury occurred in one judicial district but was caused by the defendant's action in another. A defective product, for example, could malfunction in a plaintiff's home, resulting in injury. Cf. *J. McIntyre*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) ("[T]he State in which the injury occurred would seem most suitable for litigation of a products liability tort claim.") (citing, *inter alia*, 28 U.S.C. 1391(b)); Pet. Br. 52-53. The malfunction in such a case would naturally be described as an "event," and the venue analysis would turn on whether the malfunction and accompanying injury formed "a substantial part of the events or omissions giving rise to the claim." 28 U.S.C. 1391(b)(2). No such question is presented here. Unlike the hypothetical malfunction in such a case, or the initial seizure of

To treat that continuing harm as an "event" sufficient to trigger venue would "work a transformation of the venue statute that Congress could not have intended." *Woodke* v. *Dahm*, 70 F.3d 983, 985 (8th Cir. 1995). Until 1990, the district in which the plaintiff resided was a permissible venue for diversity cases, but not for federal-question cases. See 28 U.S.C. 1391(a) and (b) (1988). In the same legislation that added the current statute's reference to "events or omissions giving rise to the claim," Congress removed the plaintiff's residence as a proper basis for venue in a diversity case. 1990 Amendments § 311, 104 Stat. 5114. As amended, the general venue statute reaffirms its fundamental purpose: to "protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy*, 443 U.S. at 183-184; *Woodke*, 70 F.3d at 985 (Congress did not abandon "the protection of defendants as a relevant consideration in venue matters.").

The practical effect of the decision below, however, is that plaintiffs will be able to lay venue in their own districts of residence in virtually every case. Even when a plaintiff is injured outside her district of residence, the effects of that injury (at least if it is worth suing about) will rarely have dissipated altogether by the time she returns home. If a Virginia resident breaks her leg in a New Jersey automobile accident, for example, her leg is unlikely to have healed entirely by the time she returns to Virginia. To hold that such a plaintiff has "suffered harm in" Virginia, and that this continuing harm is an adequate basis for venue, would substantially revive (and extend to federal-question cases) the prior ap-

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respondents' funds, respondents' continuing lack of access to the money is not properly viewed as an "event."

proach to diversity cases that Congress abandoned in 1990. See Wright § 3806.1, at 215-216; Pet. Br. 56.[14]

2. The court of appeals relied as well on other connections between Nevada and the loss and eventual return of respondents' funds. See Pet. App. 41a-42a. The court explained that respondents' "'bank' originated in Nevada"; that "documentation of the legitimacy of the money was sent [by respondents' attorney] from Nevada"; and that "the funds eventually were returned to [respondents] in Nevada." *Ibid.* Respondents' initial departure from Las Vegas with cash in hand, the attorney's transmittal of the letters, and the return of the

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[14] The fact that defendants may contest personal jurisdiction does not eliminate the ill effects of the court of appeals' overbroad construction of Section 1391(b)(2). Although limitations on personal jurisdiction and venue both serve in part to protect defendants against trial in inconvenient fora, they are distinct concepts governed by different legal standards. See *Noxell Corp.* v. *Firehouse No. 1 Bar-B-Que Rest.*, 760 F.2d 312, 316 (D.C. Cir. 1985) (Ginsburg, J.) (personal jurisdiction and venue are concepts "independent of each other" and "should be analyzed discretely" in light of "their respective underlying objectives and rationales") (citation omitted); *Gulf Ins. Co.*, 417 F.3d at 357 ("[T]he venue statute's 'substantial part' test" does not mirror "the minimum contacts test employed in personal jurisdiction inquiries."). For example, although personal service of process on a nonresident defendant temporarily within the forum State is a constitutionally sufficient basis for exercising personal jurisdiction, see *Burnham* v. *Superior Court*, 495 U.S. 604 (1990), it alone provides no basis for venue under 28 U.S.C. 1391(b). Cf. 28 U.S.C. 1391(b)(3) (Supp. V 2011) (A civil action may be brought in "any judicial district in which any defendant is subject to the court's personal jurisdiction," but only "if there is no district in which an action may otherwise be brought."). "[M]ore activity is required in venue cases than is necessary to satisfy constitutional due process" because, *inter alia*, "[t]he nature of the events' relationship with the forum for venue purposes must be 'substantial.'" Wright § 3806.1, at 233.

money are all "events" that "occurred" in Nevada. They provide no basis for laying venue there, however, because they do not "giv[e] rise to the claim[s]" asserted in this case.

In order for a particular "event" to "giv[e] rise to" respondents' constitutional claims, proof of that event must be integral, or at least germane, to the disposition of those claims. See *Jenkins Brick Co.* v. *Bremer*, 321 F.3d 1366, 1371-1372 (11th Cir. 2003). Petitioner is alleged to have violated respondents' constitutional rights by seizing their money, by drafting a false affidavit, and by seeking to have their cash forfeited. The facts that respondents began their trip in Las Vegas with significant cash in hand, and that respondents' attorney sought return of the funds, are simply irrelevant to the determination whether respondents' constitutional rights were violated. The court of appeals' reliance on the return of the funds to Nevada was particularly misplaced. Far from "giving rise to" respondents' constitutional claims, that event brought an *end* to the allegedly unconstitutional seizure of respondents' property. Cf. Fed. R. Crim. P. 41(g) ("A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return," but that "motion must be filed in the district where the property was seized."); 18 U.S.C. 981(b)(3), 983(f)(3)(A).

3. Under Section 1391(b)(2), a federal-question suit may be brought only in "a judicial district in which *a substantial part* of the events or omissions giving rise to the claim occurred." 28 U.S.C. 1391(b)(2) (emphasis added). To establish venue in Nevada, it therefore would not be sufficient for respondents to demonstrate that some small portion of the events "giving rise to the

claim[s]" occurred in that State. Rather, a "substantial" part of those events must have occurred in the district where suit is brought. See *Gulf Ins. Co.*, 417 F.3d at 357 (courts should "take seriously the adjective 'substantial'"); *Cottman Transmission Sys.*, 36 F.3d at 294 ("Substantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute.").

The search of respondents' bags, the initial seizure, the drafting of the allegedly false probable cause affidavit, and the referral for forfeiture proceedings all occurred in Georgia. Even if one or more of the Nevada connections identified by the court of appeals were properly viewed as "events" "giving rise to" respondents' claims, those events are a demonstrably *in*substantial part of the overall set of events and omissions on which respondents' claims are based. Venue in Nevada was therefore improper under Section 1391(b)(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

Interest of *Amicus Curiae* 1

Summary of Argument 1

Argument 3

I. This Court Should Not Develop A Framework For Personal Jurisdiction On Its Own 3

II. Congress Should Provide A Framework By Adopting A Comprehensive Federal Long Arm Statute 10

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987) 20

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 20

Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546 (2005) 23

Finley v. United States, 490 U.S. 545 (1989) 23

Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846 (2011) 17

Hanna v. Plumer, 380 U.S. 460 (1965) 17

Hertz Corp. v. Friend, 130 S.Ct. 1181 (2010) 3

J. McIntyre Machinery, Ltd. v. Nicastro, 131 S.Ct. 2780 (2011) ..... *passim*

National Fed'n of Indep. Business v. Sebelius, 132 S.Ct. 2566 (2012) 12

Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97 (1987) 9

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) 4, 5

Thompson v. Thompson, 484 U.S. 174 (1988) 11

United States v. Lopez, 514 U.S. 549 (1995) 12

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 14, 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

U.S. Const. Art. I, § 8 .....2, 10, 12, 13

U.S. Const. Art. I, § 10 21

U.S. Const. Art. IV, § 1 .....*passim*

STATUTES AND OTHER AUTHORITIES

Act of May 26, 1790, ch. 11, 1 Stat. 122 11

18 U.S.C. § 2265(a) 12

28 U.S.C. § 1367 .....23, 24

28 U.S.C. § 1738 11

28 U.S.C. § 1738A 11

28 U.S.C. § 1738B 12

28 U.S.C. § 1738C 12

FED. R. CIV. P. 4 .....16, 17

FED. R. CIV. P. 4 advisory committee's note to 1993 amendment, 28 U.S.C. app. at 94 16

FED. R. CIV. P. 5 19

European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments, Council Reg. 44/2001, 2001 O.J. (L.12) 3, 14, 15, 22

Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516 (1998) 19, 20

Friedrich K. Juenger, *A Shoe Unfit for Globe-trotting*, 28 U.C. DAVIS L. REV. 1027 (2005) 22

TABLE OF AUTHORITIES – Continued

Page

Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1 (1993) 22

Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491 (2004) 5

Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327 (2004) 22

Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981) 21

INTEREST OF *AMICUS CURIAE*[1]

I am not representing any clients, and the views expressed in this brief are my own. I have no monetary interest in this case. Aside from wishing to assist the Court, my interests in this case are entirely academic. I am a professor of law at The University of Tulsa College of Law, where I have taught a class in civil procedure since 1979.

SUMMARY OF ARGUMENT

This brief urges this Court to recognize the need for a federal long arm statute to confer lawful authority over nonresident defendants on the state courts. The American law of personal jurisdiction has developed through this Court's review of the application of state long arm statutes to nonresident defendants who have challenged their constitutionality under the Due Process Clause of the Fourteenth Amendment. The states have an incentive to extend the jurisdiction of their courts as far as possible so that their courts will be capable of providing redress for their citizens, and so, most of the long arm statutes provide for the assertion of jurisdiction to the maximum

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus* briefs.

extent permitted by due process. This Court's proper role in reviewing the long arm statutes is limited to determining the maximum extent of state court jurisdiction that due process will permit, as opposed to determining the most desirable allocation of jurisdiction among the state courts. This arrangement has produced a collective action problem, because neither the legislature of any state nor this Court are in a position to develop an allocation of jurisdiction among the state courts that fairly and reasonably balances the interests of the state's citizens with the interests of nonresidents whom the state's citizens may want to sue.

Congress has the power under Article IV of the United States Constitution as well as the Commerce Clause of Article I, § 8 to enact legislation that would confer lawful authority to a state's courts over nonresidents who are either citizens of other states or have sufficient contacts with the United States. Congress is in the best position to establish a framework for allocating jurisdiction among the state courts that would balance the interests of potential plaintiffs and defendants. Of course, Congress has not established such a framework, but encouragement from this Court may help to bring this about.

This case highlights the need for federal legislation on personal jurisdiction. Under this Court's precedents, the Nevada court would not have personal jurisdiction over the petitioner because the petitioner did not submit to the Nevada court's lawful authority by purposefully availing himself of benefits from

Nevada. Nevertheless, there may be compelling policy reasons why it would be appropriate for a Nevada court to exercise jurisdiction over this case, because the respondents suffered injury in Nevada, and Nevada would be a more convenient forum for the respondents than Georgia. As an American citizen, the petitioner is subject to federal legislation, and it is possible that Congress might decide to allocate personal jurisdiction over American citizens to a forum where an injury occurred, as the European Union has done in the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments. Had Congress done so, the Nevada court would have lawful authority to exercise jurisdiction over the petitioner, but in the absence of a federal long arm statute assigning jurisdiction to the place of injury, the Nevada court lacks jurisdiction over the petitioner.

ARGUMENT

I. THIS COURT SHOULD NOT DEVELOP A FRAMEWORK FOR PERSONAL JURISDICTION ON ITS OWN

Regardless of whether this Court decides to uphold the exercise of personal jurisdiction over the petitioner in this case, it should encourage Congress to enact a statute to clarify the law of personal jurisdiction. The preliminary question of which court is the proper one to decide a case ought to be amenable to a straightforward answer. This Court emphasized in its unanimous decision in *Hertz Corp. v. Friend*,

130 S.Ct. 1181 (2010), the benefits of administrative simplicity for jurisdictional rules. It observed:

> Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. . . . So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.
>
> Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.

Id. at 1193. Although this Court recognizes the need for clarity and simplicity for jurisdictional rules, it has not developed straightforward and predictable rules for personal jurisdiction. The primary reason that it has been difficult for this Court to do so appears to be the peculiar process that has developed over the years for the formulation of the rules governing the personal jurisdiction of the state courts.

In *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448 (1952), this Court decided that Ohio's exercise of general jurisdiction over a corporation for claims not arising from its activities in Ohio

was permissible, because Ohio was the corporation's principal place of business. This Court also decided in *Perkins* that the Due Process Clause would not compel a state court to exercise jurisdiction over a foreign corporation. Instead, it ruled that the decision whether the Ohio courts would take jurisdiction over the corporation was reserved to the Ohio courts.

By ruling that the Ohio courts could choose whether to take jurisdiction over a foreign corporation, *Perkins* set the stage for the passage of long arm statutes by states that sought to extend jurisdiction over nonresidents. The first comprehensive long arm statute was adopted by Illinois in 1955, and other states soon followed so that every state now has a long arm statute. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 494, 496 (2004). The original Illinois long arm statute enumerated various acts, such as the transaction of business or the commission of torts within the state, that would subject nonresidents to the jurisdiction of the states. In 1960, Rhode Island adopted a long arm statute that extended jurisdiction over nonresidents that had "the necessary minimum contacts" with the state. *Id.* at 496. Other states followed the approach of Rhode Island so that today nearly two thirds of the states extend personal jurisdiction in their courts to the limits of due process, either by statute or through judicial decision. *Id.* at 541. The primary motivation of state legislatures in enacting statutes that reach to the limits of due process, would be to protect the

interests of their own citizens, rather than the interests of nonresidents. State legislatures and courts would naturally tend to be more concerned with maximizing the ability of their own citizens to obtain legal redress for their claims than in devising a fair and rational scheme for allocating jurisdiction among all the states. Because state legislatures and courts are more concerned with providing redress for their citizens than protecting defendants from other states from having to litigate in their courts, they have a strong tendency to overreach by asserting jurisdiction as far as possible, even though it surely would be less burdensome for all the states to allocate jurisdiction more fairly and rationally. The states should not be expected to allocate jurisdiction reasonably among themselves, and clearly they have not done so.

When this Court decides personal jurisdiction cases, it is not developing a common law of jurisdiction, but instead is reviewing the constitutionality of state court assertions of personal jurisdiction under these long arm statutes. In doing so, this Court should properly be concerned with determining whether a state court has attempted to assert jurisdiction beyond the maximum extent that due process permits. This is a different role than formulating a straightforward and predictable set of jurisdictional rules that balance the interests of residents and nonresidents of a forum state appropriately.

The plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011), emphasized

the limitations of due process on a state court's assertion of jurisdiction over a nonresident defendant. It explained the connection between due process and a state court's assertion of jurisdiction in terms of the court's having acquired lawful authority to adjudicate, noting that "[a]s a general rule, neither statute nor judicial decree may bind strangers to the State." *Id.* at 2787. The plurality opinion identified only one means for a state court to acquire lawful authority to adjudicate, which was through the defendant's submission to the state's authority, but it added that the submission might occur in various ways. These included explicit consent, and in addition, circumstances or a course of conduct that gave rise to an inference of an intent to benefit from and therefore submit to the laws of the forum state, such as presence within a state at the time of service of process, citizenship or domicile for individuals, and incorporation or having a principal place of business in the state for corporations. The final way that the plurality opinion described for a defendant to submit to a state's authority was by purposefully conducting activities within the state, thereby invoking the benefits and protections of its laws, but this form of submission was limited to claims arising or related to the defendant's activities within the state. *Id.* at 2787-80.

The dissenting opinion in the *McIntyre* case based the assertion of personal jurisdiction on considerations of reason and fairness. It stated: "The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*,

gave prime place to reason and fairness." *Id.* at 2800 (Ginsburg, J., dissenting). Rather than focusing on whether the defendant had submitted to the authority of the state court, the dissenting opinion emphasized policy considerations, such as that "the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim," *id.* at 2798, whether the defendant had liability insurance, *id.* at 2799, the relative burdens of litigation in different locations on the plaintiff and the defendant, *id.* at 2801-02, and whether rejecting jurisdiction over the defendant would place "United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world," *id.* at 2803. The dissenting opinion pointed out that the European Union permitted jurisdiction in tort cases to be exercised by the courts of the place of injury as well as at the place where the harmful act occurred. The European Union's allocation of jurisdiction derives from the unanimous agreement of the member states of the European Union. *Id.* at 2803 n.16. There is no such agreement for allocating jurisdiction in the United States, however; there are only the long arm statutes of the individual states and the limitations of due process.

The disagreement between the plurality and dissenting opinions may be related to differing views of the appropriate role of this Court in reviewing assertions of personal jurisdiction by state courts. The plurality opinion in *McIntyre* was strictly limited to deciding whether the exercise of jurisdiction exceeded

the limits of due process, while the dissenting opinion was concerned with "the fair and reasonable allocation of adjudicatory authority among States of the United States." *Id.* at 2798. Achieving a fair and reasonable allocation of jurisdiction among the state courts is a worthwhile ultimate goal, but for several reasons, it should be accomplished primarily by the political branches of government, rather than this Court acting on its own. First, the role that this Court has articulated in its review of assertions of personal jurisdiction has been to determine whether state courts have exceeded the limits of due process, rather than to fashion a federal common law for the allocation of jurisdiction among the states. *See Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 111 (1987) ("We reject the suggestion that we should create a common-law rule authorizing service of process, since we would consider that action unwise, even were it within our power."). In addition, the political branches of government are better suited than this Court for balancing conflicting interests and policy considerations. Moreover, the political branches of government are more able to engage in the sort of line-drawing that is needed for clear jurisdictional rules than this Court can readily accomplish through either analysis of due process or the development of a federal common law.

Federal legislation allocating personal jurisdiction among the state courts in a rational and comprehensive way could accommodate the concerns expressed in both the plurality and dissenting opinions in

McIntyre. Since the federal government has lawful authority over American residents, regardless of the particular state they reside in, a federal long arm statute could provide a designated state court with the lawful authority over a nonresident defendant that the plurality opinion would require. At the same time, a federal long arm statute could take into account the various policy considerations of reason and fairness, such as litigational convenience, that the dissenting opinion looked to as controlling. In addition, a federal long arm statute could consider the modern-day consequences of an allocation of personal jurisdiction among the states as well as the relevant commercial circumstances that the concurring opinion in *McIntyre* emphasized. Of course, there would have to be a source of Congressional power for a federal long arm statute for it to be effective, however.

II. CONGRESS SHOULD PROVIDE A FRAMEWORK BY ADOPTING A COMPREHENSIVE FEDERAL LONG ARM STATUTE

Congressional authority for legislation for the allocation of jurisdiction among state courts could be based on either the Full Faith and Credit Section in Article IV, § 1 or the Interstate Commerce Clause for defendants who are citizens of the United States and the Foreign Commerce Clause for foreign defendants. Article IV, § 1 provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the

Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." The second sentence of this Section expressly grants Congress authority to regulate the effect of judgments, and this would appear to include placing restrictions on personal jurisdiction for state courts.

Congress first exercised its authority under the Full Faith and Credit Section in Article IV in 1790 by adopting the predecessor to current 28 U.S.C. § 1738, which requires the federal courts to give full faith and credit to state court judgments. Act of May 26, 1790, ch. 11, 1 Stat. 122. Beginning in 1980, Congress has also enacted several statutes in the area of family law under the Full Faith and Credit Section. Because child custody decrees may generally be modified on grounds of changed circumstances to serve the best interests of children, there had been a problem with divorcing parents filing subsequent actions to relitigate unfavorable child custody decisions. *See Thompson v. Thompson*, 484 U.S. 174, 180-82 (1988). In response to this situation, Congress passed the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2006), to prohibit states from modifying a child custody decree from another state, as long as the state that issued the decree had various specified connections with the child (such as that the state issuing the decree was the home state of the child). 484 U.S. at 181-82. Similar problems existed with child support obligations, and so, Congress adopted the Full Faith and Credit for Child Support Orders

Act, 28 U.S.C. § 1738B (2006), to prevent relitigation of child support orders in other states. In addition, Congress provided for full faith and credit to be given to domestic protection orders in the Violence Against Women Act, 18 U.S.C. § 2265(a) (2006). Each of these three Acts specifies conditions for the various orders to satisfy in order for other states to be required to give them full faith and credit. Finally, the Defense of Marriage Act, 28 U.S.C. § 1738C (2006), provides that other states are not required to give effect to particular public acts and judicial determinations by a state: those that involve same sex marriages. Thus, there is substantial precedent for Congress relying on the Full Faith and Credit Section to enact legislation that specifies conditions for states to give full faith and credit to judicial proceedings from other states.

Congressional authority for the allocation of jurisdiction among the states could also be based on the Interstate and Foreign Commerce Clauses. The state court's assertion of jurisdiction over defendants from other states or countries does not involve a purely local matter, and, therefore, it would affect interstate or foreign commerce. *Compare United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (possession of a gun in a local school zone did not substantially affect interstate commerce), *with National Fed'n of Indep. Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012) (Congressional power extends to the regulation of an activity that by itself substantially affects interstate commerce and to activities that do so only when aggregated with similar activities of others).

A federal statute allocating jurisdiction among the state courts would supply an alternative basis besides submission to a state's authority for the exercise of jurisdiction by the state court. The plurality opinion in *McIntyre* addressed only one way for a state court to acquire lawful authority to adjudicate, which was through the defendant's submission to the state's authority. *McIntyre*, 131 S.Ct. at 2787. But if the real basis for satisfying the requirement of due process is a court's having lawful authority over a defendant, rather than the defendant's purposefully availing itself of the privilege of conducting activities in the forum state, then there ought to be other ways to satisfy due process besides the defendant's submission to the state's authority. The enactment of federal legislation pursuant to the Full Faith and Credit Section and the Commerce Clauses that allocated personal jurisdiction among the state courts would surely also provide state courts with lawful authority over American defendants. In general, United States residents are bound by Acts of Congress that have been duly adopted by their elected representatives. Federal legislation conferring jurisdiction over non-resident defendants on state courts would provide a firmer basis for jurisdiction over defendants from other states than the implied consent to jurisdiction that the plurality opinion in *McIntyre* relied on. In addition, to the extent that a foreign defendant submitted to American authority by purposefully conducting activities within the United States, thereby invoking the benefits and protections of the laws of the United States, federal legislation could provide a

state court with lawful authority over the foreign defendant. A federal long arm statute would also make assertions of state court jurisdiction more predictable, which this Court has identified as an important benefit that the Due Process Clause protects. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The plurality opinion in *McIntyre* alluded to the possibility of federal legislation: "It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts." 131 S.Ct. at 2790. Since Congress has not enacted any applicable legislation concerning personal jurisdiction, however, it was not necessary for the opinion to address whether Congress had authority to legislate with respect to state court jurisdiction.

There are a variety of approaches to allocating state court jurisdiction that Congress might consider. One possibility would be an approach based on the European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments, Council Reg. 44/2001, 2001 O.J. (L.12) [hereinafter the European Regulation], which governs jurisdiction in disputes between persons domiciled in different countries in the European Union. Article 2 of the European Regulation provides for general jurisdiction over a defendant where the defendant is domiciled. *Id.* 2001 O.J. (L.12) 3. In addition, there are a number of special provisions for various types of claims. Jurisdiction over matters relating to a contract is assigned to the

place of performance of the obligation, which is the place where goods were delivered or should have been delivered for contracts for the sale of goods, and the place where services were provided or should have been provided for contracts for services. *Id.* Art. 5, 2001 O.J. (L.12) 4. Jurisdiction over tort matters is assigned to the place where the harmful event occurred or may occur, *id.*, and as the dissenting opinion in *McIntyre* noted, 131 S.Ct. at 2801-02 (Ginsburg, J., dissenting), the European Court of Justice has interpreted this to mean either where the damage occurred or the place of the event that gave rise to the damage. The European Regulation also has special provisions for matters relating to insurance and consumer contracts, which authorize jurisdiction where the policy holder, insured, or beneficiary, or consumer is domiciled as well as where the defendant is domiciled. European Regulation, Arts. 9, 16, 2001 O.J. (L.12) 5, 7. In addition, it authorizes jurisdiction in cases involving multiple defendants where any of them are domiciled if the claims against them are so closely connected that there would be a risk of irreconcilable judgments from separate actions. *Id.* Art. 6, 2001 O.J. (L.12) 4-5.

These examples illustrate the type of sensible and practical jurisdictional rules that federal legislation could provide. It is likely that this Court would find that a number of these examples would violate due process in the absence of Congressional action in cases where it could not be shown that the defendants submitted to jurisdiction. For example, a provision

authorizing jurisdiction in the state where the plaintiff's injury occurred would have permitted the Oklahoma state court to exercise jurisdiction over the retailer and distributor in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), but this Court held in that case that jurisdiction over the retailer and distributor violated due process. *Id.* at 299. Congressional action would supply an alternative basis for extending lawful authority to the designated forum states, however, so that these examples of jurisdictional rules would comply with due process under the plurality opinion in *McIntyre*. Federal legislation might also provide an exception from jurisdiction for small businesses, such as the hypothetical owner of a small Florida farm who sold crops to a nearby national distributor that the plurality opinion in *McIntyre* expressed concern about, 131 S.Ct. at 2790, but whether the legislation should include such an exception ought to be a policy matter, rather than a requirement of due process.

An alternative to the enactment of a federal long arm statute that would suffice to some extent for cases such as the present one that were filed in the federal courts could perhaps be accomplished by revision of FED. R. CIV. P. 4. *See* FED. R. CIV. P. 4 advisory committee's note to 1993 amendment, 28 U.S.C. app. at 94. FED. R. CIV. P. 4(k)(1)(A) incorporates the long arm statute of the state where the federal district court is located, but FED. R. CIV. P. 4(k) also authorizes the district court to assert personal jurisdiction beyond the limits of the state's long arm

statute to a limited extent. FED. R. CIV. P. 4(k) might be amended to allow for expansion of the personal jurisdiction over a defendant to the place of injury in tort cases, for example, as long as the defendant had minimum contacts with the United States, rather than with the state where the district court is located. This alternative is less desirable than a federal long arm statute that would confer jurisdiction over non-resident defendants on the state courts, because it would not apply to actions filed in state courts. Moreover, an amendment to FED. R. CIV. P. 4(k) would create a larger disparity in the reach of personal jurisdiction between state and federal courts. This would provide incentives for filing actions in federal court, where there was concurrent subject matter jurisdiction between federal and state court, and thus encourage forum-shopping between federal and state courts. *See generally Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (aims of *Erie R. Co. v. Tompkins* rule were discouragement of forum-shopping and inequitable administration of the laws).

A significant benefit of federal legislation is that the legislation could specify clear boundaries that would be difficult for this Court to establish by itself through analysis of due process. The level of a corporation's business activity in a state that would be both necessary and sufficient for a state to exercise general jurisdiction over the corporation provides a good example. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011), this Court unanimously held that a parent corporation's sale

in a state of goods that were manufactured by a foreign subsidiary was not an adequate basis for general jurisdiction over the foreign subsidiary when the subsidiary did not direct the shipment of the goods to the state. However, this Court did not limit general jurisdiction to a corporation's state of incorporation or principal place of business or attempt to specify the kind or level of activity that would be necessary for the assertion of general jurisdiction, because there was no need for the Court to do so in order to reach its decision. In contrast, Congress could choose to authorize general jurisdiction over a corporation beyond its state of incorporation and principal place of business, and if it did so, Congress could also specify requirements for the continuous and systematic activity in a state that would warrant the exercise of general jurisdiction there. These requirements might include being registered to do business or having a place of business with a specified number of employees in the state, owning a requisite amount of property, or conducting a specific level of business activity in the state for a requisite period of time. These matters ought to be governed by policy considerations appropriate for legislative determinations, rather than the limits of due process as declared by this Court.

Another advantage of Congressional legislation over the development of the law of personal jurisdiction through this Court's pronouncements is that a federal long arm statute could be modified as needed to take into account technological developments and changing social conditions. The concurring opinion

in *McIntyre* expressed concern about the need to have "a better understanding of the relevant contemporary commercial circumstances" before changing the law of personal jurisdiction. 131 S.Ct. at 2794. It also raised hypothetical questions about how the plurality opinion's standards would apply to businesses that market their products through Web sites or popup advertisements. Federal legislation could not only adjust to current business methods, but it could also respond to future developments.

Technological developments may affect court operations as well as national and global transportation and commerce. Electronic filing has already become the norm in the federal courts, *see* FED. R. CIV. P. 5(e) (authorizing local rules to require electronic filing if reasonable exceptions are allowed), and it is spreading rapidly to the state courts as well. Electronic filing facilitates litigation from distant locations, and thus it may affect considerations of convenience of the forum with respect to the parties, which may in turn influence the reasonableness of the assertion of jurisdiction. Further developments are inevitable, and one day traditional trials may be replaced by the virtual trials that Professor Carrington predicted with prerecorded testimony being introduced through multi-media presentations, rather than through live witnesses. *See* Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1524-29 (1998). Once the defendant's right to participate in a trial could be accommodated by electronically transmitting the trial

to the defendant's location, the defendant's convenience would nearly be eliminated as a factor in the analysis of jurisdiction. *Id.* at 1535. The reach of a federal long arm statute could be adjusted to respond to these kinds of developments.

The need for involvement of the political branches of the federal government in the law of personal jurisdiction is especially pronounced with respect to foreign defendants. State legislatures and courts can be expected to be even less concerned with the interests of foreign defendants than they are with the interests of defendants from other states, and so, they are at least as likely to overreach with respect to asserting personal jurisdiction over foreign defendants. A state court's exercise of jurisdiction over a defendant from a foreign country may affect foreign relations, but foreign relations are properly within the purview of the federal government, rather than the states. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964). This Court emphasized the effect of the assertion of personal jurisdiction over alien defendants on the procedural and substantive interests of other nations and the federal interest in foreign relations in rejecting a state court's assertion of jurisdiction over the Japanese manufacturer in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987). Treaties with foreign countries would be helpful for securing the enforcement of American judgments in foreign countries, but in contrast to the federal government, the states are barred from making treaties with foreign countries.

U.S. Const. art. I, § 10 ("No state shall enter into any treaty, alliance, or confederation."). It is therefore incongruous that personal jurisdiction over foreign defendants should be determined by long arm statutes enacted by state legislatures and interpreted by state courts, rather than by federal statutes and treaties. Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 484 (1981) ("Using state long-arm statutes to obtain jurisdiction over aliens effectively enables state legislatures to establish the requisite level of contacts, and thus to intervene in an area that properly demands direct congressional supervision.").

A federal long arm statute would not be adequate for obtaining jurisdiction over foreign defendants who did not submit to the jurisdiction of American courts, however. This Court would probably not uphold the constitutionality of a judgment against a foreign defendant if the defendant did not submit to American jurisdiction. *See J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011). And even if such a judgment was found to be constitutional, it would probably not be enforceable in another country, because other countries are not subject to the Full Faith and Credit Section of Article IV. Instead, a treaty between the United States and the particular foreign country where a foreign defendant resides would be necessary for a state court to exercise jurisdiction over a foreign defendant who had not submitted to the jurisdiction of United States courts.

The United States has not entered into any treaties that govern personal jurisdiction, as the European Regulation does for the European Union. *See* Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 329 (2004). Part of the reason the United States has not made treaties governing personal jurisdiction has been the lack of predictability of the American law of personal jurisdiction coupled with the possibility that this Court might decide that a treaty's provisions violated due process. *See* Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1041 (2005) ("[T]he United States Supreme Court has not only created an unsatisfactory body of jurisdictional law, it has tied the hands of the Executive. Frustrating efforts to reach an accommodation with foreign nations in the field of judgments recognition, the Court unduly limits this nation's treaty-making power."); Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 22 (1993) ("[T]he Court's linkage of jurisdiction to the Due Process Clause ties the negotiators' hands. Indeed, curtailing this country's ability to enter into accords with foreign nations may well be the worst aspect of the Court's jurisdictional case law."). Like a federal long arm statute, duly adopted treaties between the United States and foreign countries that authorized personal jurisdiction in designated state courts would provide those courts with the lawful authority that due process requires. In addition, treaties could provide for the

enforceability of American judgments that were rendered in compliance with the terms of the treaties.

By establishing clear and predictable jurisdictional rules, a federal long arm statute and jurisdictional treaties would have numerous advantages from a theoretical standpoint over the complex and uncertain case law based on the Due Process Clause.

CONCLUSION

Twenty four years ago, this Court decided in *Finley v. United States*, 490 U.S. 545 (1989), that there was no pendent-party subject matter jurisdiction in the federal courts over nonfederal claims against additional parties where the nonfederal claims were related to federal claims against other parties, because there was no statutory authorization for the pendent-party subject matter jurisdiction. The Court included the following suggestion in its opinion: "Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Id.* at 556. Congress responded to this suggestion by adopting 28 U.S.C. § 1367 (2006), which authorized supplemental jurisdiction over pendent-party claims, such as the one in *Finley*. *See Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 557 (2005)

("In 1990, Congress accepted the invitation."). Section 1367 provided a statutory foundation for pendent and ancillary jurisdiction, which had been lacking for many decades. Hopefully, similar guidance from this Court would encourage Congress to clarify the law of personal jurisdiction by adopting a federal long arm statute to confer lawful authority over nonresident defendants on the state courts.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-574

In the Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALABAMA, ARIZONA, DISTRICT OF COLUMBIA, GEORGIA, HAWAII, IDAHO, INDIANA, KENTUCKY, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The *amici* States take no position on the legality of petitioner's conduct or the venue question presented by this case. This brief addresses the following question presented, which the Court should answer in petitioner's favor:

Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The lower court's rule strikes the wrong balance between state interests. 4

A. The plaintiff's State's interest in providing a remedy is insufficient to confer jurisdiction 5

B. The State where the conduct occurred has the most substantial interest in providing a forum for the dispute. 7

C. The lower court's rule will lead to an inefficient and unfair interstate-litigation system 9

II. The lower court's rule would have especially bad effects on state and local law-enforcement officers 11

A. State and local police officers are sued all the time 13

B. It is costly and unfair to litigate these cases outside the law-enforcement officer's home state. 15

CONCLUSION 18

TABLE OF AUTHORITIES

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Alfred L. Snapp & Son, Inc. v. Puerto Rico,
458 U.S. 592 (1982).....5, 8

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No. 4955, 2002 WL 433735
(Pa. Commw. Ct. Mar. 5, 2002).....6

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480 U.S. 102 (1987).....4, 17

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403 U.S. 388 (1971).....13

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495 U.S. 604 (1990).....8

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465 U.S. 783 (1984).....3

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No. 07-CV-1815,
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report and recommendation adopted by
2012 WL 693525 12

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No. 93-CV-212, 1995 WL 75386
(N.D. Ill. Feb. 22, 1995) 12

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2008 WL 451034 (Cal. Ct. App. Feb. 21,
2008).....7

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici curiae* are States that share a concern about the Ninth Circuit's expansion of personal jurisdiction to their residents. To be sure, the States have an interest in vindicating the injuries of their own residents, as plaintiffs, in their own courts. But it is the collective judgment of the *amici* that this interest is outweighed by their interest in protecting their residents from being haled, unfairly, into other States' courts as defendants. The mutual respect between States is harmed when a plaintiff from one State can sue another State's resident in a faraway court based on actions that occurred entirely within the defendant's State. The defendant's mere knowledge of the plaintiff's State of residence is not enough to give that State personal jurisdiction over the defendant.

The *amici* States are especially troubled by the Ninth Circuit's application of its expansive personal-jurisdiction rule to the facts of this case. This is not a case about libel or the Internet. This is a case about a face-to-face confrontation that began when the plaintiff physically came into the defendant's State and, except for some paperwork, ended when the plaintiff left. Potential plaintiffs do not carry their home State's personal jurisdiction with them whenever they travel through other States.

The Ninth Circuit's contrary rule would subject a State's law-enforcement officers to suit in the State of nearly every person with whom those officers interact during the course of their duties. These

officers have no reasonable expectation of being haled into courts across the country for carrying out their official duties in their home State. Police officers already have enough to worry about when they make a traffic stop; they should not also be concerned about being sued in a faraway court based on their knowledge of a car's out-of-state license plate.

It would be very easy for a State to maintain, in a particular case in which one of its residents has been harmed, that it wants its own courts to resolve these kinds of disputes. But it is the considered judgment of the *amici* States that, in the long run, their residents are better off if personal jurisdiction is not based solely on the defendant's knowledge of the plaintiff's home State. The Court should reverse the Ninth Circuit's ruling on personal jurisdiction.

SUMMARY OF ARGUMENT

The lower court's rule is erroneous, unfair, and unworkable.

The lower court struck the wrong balance between the state interests affected by the doctrine of personal jurisdiction. A plaintiff's home State always has an interest in providing a forum for its residents to seek redress. But that interest is not alone sufficient to give that State personal jurisdiction over the residents of other States. Instead, in cases like this one, the State with the strongest interest in providing a forum for the dispute is the State in which the tort occurred, not the State where the plaintiff happens to reside.

Because the lower court's rule would lead to unfairness and inefficiency, the States' shared interest in a workable interstate-litigation system weighs against finding personal jurisdiction on the facts of this case.

The lower court's rule is especially unfair and impractical when applied to litigation against state and local police officers. Police officers in high-traffic areas are uniquely vulnerable to being sued, and there are thousands of lawsuits filed against them every year. If this Court were to affirm the lower court, much of that litigation would be filed outside the officer's jurisdiction. This result would require state and local governments to identify and hire private counsel, lead to duplicative litigation about the same events in far-flung jurisdictions, and otherwise increase the cost of this kind of litigation.

The best result for the *amici* States is reversal.

ARGUMENT

The lower court fundamentally misunderstood the nature of state sovereignty implicated by the Due Process Clause. It is not the State's residents who exercise personal jurisdiction over defendants. It is the States themselves that do. Due process thus requires that a defendant have contacts not simply with one of the State's residents, but with the State itself. *See Calder v. Jones*, 465 U.S. 783 (1984). This rule strikes the right balance between the States' competing interests in providing redress for their residents' injuries, regulating conduct that occurs within their territory, and maintaining a fair

interstate-litigation system. This is also the right rule for the States' law-enforcement officers, who face special disadvantages when litigating in another State.

I. The lower court's rule strikes the wrong balance between state interests.

Our Federalism does not allow a court to exercise jurisdiction over a defendant whose only "contact" with the forum State is knowledge that the plaintiff lives there. The minimum-contacts requirement is "more than a guarantee of immunity from inconvenient or distant litigation." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). It is a consequence of the States' "status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *see also* A. Benjamin Spencer, *Jurisdiction To Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 637-46 (2006). Accordingly, this Court's personal-jurisdiction precedents balance "the interests of the forum State," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies." *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 113 (1987) (internal quotation marks omitted). When the defendant does not intentionally aim his conduct at the State, when the defendant's conduct does not occur within the State, and when the State's

laws do not apply, the balance of interests decidedly weigh against that State's exercise of jurisdiction. In that circumstance, the forum State's interest is pure happenstance. Because of the respect States have for each other, this interest must give way to the paramount interest of its sister States in regulating conduct that takes place within their own borders.

A. The plaintiff's State's interest in providing a remedy is insufficient to confer jurisdiction.

Make no mistake about it: States want their citizens to obtain redress no matter where or how they are injured. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (noting the state "interest in the health and well-being—both physical and economic—of its residents in general"). But this interest is not alone sufficient to justify a State's exercise of jurisdiction over an out-of-state defendant. Instead, a defendant must "purposefully avail itself of the benefits and protections of [the forum State's] laws" or "attempt to obstruct [the forum State's] laws." *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality) (internal quotation marks omitted). In other words, a defendant must have some contact with *the State*, not merely one of the State's residents.

State courts know the difference between conduct aimed at their States and conduct that merely affects one of their residents. The Supreme Court of Alabama, for example, has consistently held that "mere awareness that one's intentional acts will

cause harm in the forum state" is not sufficient. *Ex parte Gregory*, 947 So. 2d 385, 394 (Ala. 2006). "[T]he mere fact that an Alabama resident, injured in another state by a completed tort committed there by someone who is not a resident of Alabama, might be expected to suffer further or ongoing damage upon return to Alabama" does not constitute "sufficient contacts to warrant the exercise of in personam jurisdiction over the nonresident defendants." *Id.* at 395. Instead, personal jurisdiction "require[s] something more" than "knowledge" of the plaintiff's residence. *Id.* at 396. Many other state courts have reached the same conclusion.[1]

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[1] *See, e.g.*, *M.R. v. SereniCare Funeral Home, L.L.C.*, 296 P.3d 492, 496 (N.M. App. 2013) (defendant's "knowledge that the body was being prepared for a funeral service in New Mexico" does not "constitute minimum contacts sufficient to satisfy due process"); *Midwest Mfg., Inc. v. Ausland*, 273 P.3d 804, 811 (Kan. App. 2012) (a plaintiff cannot "hale any defendant into court in the plaintiff's home state" just because "the defendant has committed an intentional tort against the plaintiff"); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788-89 (Tex. 2005) (rejecting the argument that "'[i]f a tortfeasor knows that the brunt of the injury will be felt by a particular resident in the forum state, he must reasonably anticipate being haled into court there to answer for his actions'"); *Griffis v. Luban*, 646 N.W.2d 527, 534-35 (Minn. 2002) ("[I]t follows that something more than defendant's knowledge that the plaintiff is a resident of the forum and will feel the effects of the tortious conduct there must be necessary to satisfy the effects test."); *Am. Bus. Fin. Servs., Inc. v. First Union Nat'l Bank*, No. 4955, 2002 WL 433735, at *8 (Pa. Commw. Ct. Mar. 5, 2002) ("While the defendant's knowledge that the plaintiff is located in the forum is essential under *Calder*, such knowledge alone is insufficient to show that the defendant specifically targeted its conduct toward the forum.");

This near unanimity makes sense because a defendant's mere knowledge of the plaintiff's residence is usually not a meaningful contact from the State's perspective. A hypothetical proves the point. What if the defendant in this case had *believed* that the plaintiffs were from Idaho even though they were actually from Nevada? The defendant's mistaken belief would not have given Idaho an interest in providing a forum for the plaintiffs. Nor would it have diminished Nevada's. The defendant's knowledge may be relevant in some cases, but it is more likely to be an irrelevant "random, isolated, or fortuitous" circumstance. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). It is not the only touchstone of personal jurisdiction.

B. The State where the conduct occurred has the most substantial interest in providing a forum for the dispute.

The States share an interest in seeing that, when a tort occurs entirely within one State, that State is the one to adjudicate the dispute according to its own values, policies, and priorities. It is understandable that the professional gamblers who are the plaintiffs in this case chose to file suit in Las Vegas instead of Atlanta. But a Nevada judge and jury have no business adjudicating the propriety of a Georgia police officer's decision to seize property in a Georgia

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Zap v. Daimlerchrysler AG, No. B193331, 2008 WL 451034 (Cal. Ct. App. Feb. 21, 2008) (unpublished) ("[K]nowledge, by itself, that tortious activities *may* harm California residents is not sufficient to the exercise of personal jurisdiction.").

airport, merely because the plaintiffs are Nevada residents.

There has always been a territorial bent to this Court's personal-jurisdiction doctrine, and rightfully so. *E.g. Burnham v. Superior Ct. of Cal., Cnty. of Marin*, 495 U.S. 604 (1990). States have a paramount interest in "the exercise of sovereign power over individuals and entities within the[ir] relevant jurisdiction." *Snapp*, 458 U.S. at 601. Indeed, "'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State." *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 692 (6th Cir. 1994) (quoting *Snapp*, 458 U.S. at 601); *see also Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999). States thus have a "direct stake" in enforcing their own laws, which includes "defending the standards [they] embod[y]" and the officers who apply them. *Associated Builders & Contractors*, 16 F.3d at 692.

The Court has recognized that a State has an interest in exercising power over someone who purposefully attempts to frustrate or defeat its laws or has otherwise purposefully "followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign." *J. McIntyre*, 131 S. Ct. at 2789 (plurality). But the Ninth Circuit's rule turns this notion of "purposeful availment" on its head. The defendant here did not seek the benefits and protections of Nevada law. Nor did he seek to obstruct or undermine Nevada law by targeting Nevada through the Internet, phone, or mail. Instead, the plaintiff availed himself of the

legal protections of *defendant's* jurisdiction (and was accused of obstructing the laws of defendant's jurisdiction), not the other way around. In cases like this one, the State with the sovereign interest in enforcing the law is the State where the conduct occurred, not the State where the plaintiff happens to live.

C. The lower court's rule will lead to an inefficient and unfair interstate-litigation system.

The interstate-litigation system is harmed when a State's citizens can be haled into courts far from the site of their conduct, based solely on their knowledge of the plaintiff's state of residence. The Ninth Circuit's rule leads to inefficiency and unfairness in at least three ways.

1. First, the Ninth Circuit's rule disproportionately affects people who work in a field where they, while operating within their own States, are exposed to people from outside their State. These people include not only law-enforcement officers but also hotel receptionists, rental-car agents, employees at tourist attractions, and administrators and staff of national universities. These employees (and their employers) often have legitimate, important reasons to know the primary residence of people with whom they come into contact. The Ninth Circuit's rule incentivizes these workers to remain willfully ignorant of the home States of the people with whom they interact, even if that information may otherwise help them carry out their responsibilities.

2. Second, the Ninth Circuit's rule treats similarly situated plaintiffs differently based solely on the defendant's knowledge. Imagine that a defendant commits the same intentional tort (*e.g.* assault or intentional inflection of emotional distress), at the same time, in the same place, by the same act, against two different people. And assume that the defendant happens to know the home State of the first person, but not second person. Under the lower court's rule, the first person could hale the defendant into his home State's court, but the second person could not. This will be so even if the defendant's conduct is *exactly the same* towards each person. This result, as the dissent below explained, "flouts common sense." Pet. App. 64a. It is unfair to the plaintiffs and makes it difficult for a defendant to predict where his conduct will subject him to suit.

3. Third, the Ninth Circuit's rule would lead to duplicative multi-forum litigation because it would *always* allow a defendant in a lawsuit to countersue the plaintiff in the defendant's own jurisdiction. The case of *Midwest Mfg., Inc. v. Ausland*, 273 P.3d 804 (Kan. App. 2012), is instructive. There, a resident of California sued a resident of Kansas in California over the Kansan's activities in California. *Id.* at 808. The Kansan then countersued for wrongful prosecution in Kansas, arguing that Kansas had personal jurisdiction because the Californian knew about the Kansan's ties to Kansas when the original suit was filed. *Id.* The Kansas court properly rejected this argument. If mere knowledge of residence allowed jurisdiction, then "every plaintiff and every plaintiff's counsel bringing an action of any type

against a nonresident defendant in the plaintiff's home forum is subject to being haled into court in a malicious prosecution action in the nonresident's home forum if the nonresident defendant ultimately prevails in the original action." *Id.* at 811. If the Ninth Circuit's rule were the law, then plaintiffs' attorneys and others who litigate against out-of-state corporations would be subject to countersuit in those corporations' headquarters, as would prosecutors who prosecute residents of other States.

II. The lower court's rule would have especially bad effects on state and local law-enforcement officers.

Given that the vast majority of law-enforcement officers are state and local, it comes as no surprise that the defendant in this case is not a full-time federal DEA agent. He is, instead, a police officer for the City of Covington, Georgia, who was deputized as a federal narcotics investigator and assigned to a drug-enforcement task force at the Atlanta airport. JA 39-40. There are roughly 750,000 state and local police officers in the United States, and many of them work in towns and suburbs like Covington. Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2011), *available at* http://www.bjs.gov/content/pub/pdf/csllea08.pdf.

The *amici* recognize that civil-rights lawsuits against police officers provide an important check against official misconduct. But it has been the near-universal conclusion of the lower courts that this

kind of litigation should take place in the officer's own jurisdiction, not in a foreign forum where the officer has never been.[2] *See, e.g.*, *Olmeda v. Babbits*, No. 07-CV-2140, 2008 WL 282122 (S.D.N.Y. Jan. 28, 2008) (no personal jurisdiction over out-of-state defendants who seized a plaintiff and his luggage in a bus terminal); *Stonehill v. Hawley*, No. 07-CV-1815, 2008 WL 163698 (D.N.J. Jan. 14, 2008) (no personal jurisdiction over out-of-state defendants for "advanced security screening at the Denver International Airport"). Under the lower court's rule, almost all of this litigation will now take place in the *plaintiff's* home State. The sheer volume of litigation that will be moved to out-of-state jurisdictions, and the difficulties of litigating it, will impose substantial costs on state and local governments.

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[2] Courts have also declined to exercise personal jurisdiction over out-of-state police officers who have lodged arrest warrants in national databases. *See, e.g.*, *Hicks v. Assistant Att'y Gen.*, No. 08-CV-362, 2010 WL 5067611, at *5 (W.D. Mo. Dec. 6, 2010); *Snyder v. Snyder*, No. 06-CV-3072, 2007 WL 894415, at *4 (D. Minn. Mar. 21, 2007); *Cook v. Holzberger*, 788 F. Supp. 347, 351 (S.D. Ohio 1992). This is so even when out-of-state law-enforcement officials respond to inquiries from forum State officials executing the warrant, exchange telephone calls with forum state officials, or submit forms from the forum State. *See, e.g.*, *Tisdale v. Nadramia*, No. 11-CV-647, 2012 WL 693563, at *4 (D.S.C. Feb. 7, 2012), *report and recommendation adopted by* 2012 WL 693525; *Ray v. Simon*, No. 07-CV-1143, 2008 WL 5412067, at *16 (D.S.C. Dec. 24, 2008); *Williams v. Cook Cnty. Sheriff's Dep't*, No. 93-CV-212, 1995 WL 75386, at *2 (N.D. Ill. Feb. 22, 1995).

A. State and local police officers are sued all the time.

Police officers play a "special role" that makes them "particularly vulnerable" to lawsuits. LARRY K. GAINES & VICTOR E. KAPPELER, POLICING IN AMERICA 406 (7th ed. 2011). Police interact with approximately 43.6 million people annually and most of those interactions are involuntary and inconvenient. Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 352, 355 (2003). Members of the public are taking their frustrations to the courtroom with increasing frequency. *Id.* at 354. Plaintiffs file more than 30,000 civil actions against officers every year. *See id.* at 355; Mark Stevens, Civil Liability for Government Wrongdoing (North Carolina Wesleyan College, 2004), *at* http://faculty.ncwc.edu/mstevens/205/ 205lect12.htm.

If the Ninth Circuit's rule stands, any person who interacts with the police in the most basic of ways can hale them into court in his or her home State. Members of the public can pursue many causes of action against the police. *See generally* 42 U.S.C. §§ 1981, 1983, 1985; *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (permitting § 1983-like claims against federal officers); ROLANDO V. DEL CARMEN, CRIMINAL PROCEDURE: LAW & PRACTICE 456-62 (2008) (discussing a range of common law torts). And run-of-the-mill encounters with police can give rise to these causes of action. For example,

every time an officer stops and searches a car, he can be sued for an alleged Fourth Amendment violation.

This kind of litigation can disrupt law enforcement and "nearly bankrupt[]" municipalities. GAINES & KAPPELER, *supra*, at 383. These suits often affect a large portion of a local police force, distracting them from their official duties. In Cincinnati, for example, nearly 20% of municipal police officers have been sued. Novak et al., *supra*, at 358. Twenty-seven percent of the police officers in one Southern county reported that they had been sued during the course of their careers. *See* Daniel E. Hall, Lois A. Ventura, Yung H. Lee & Eric Lambert, *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT'L J. OF POLICE STRATEGIES & MGMT. 529, 535 (2003). The potential for litigation is particularly high in heavily trafficked areas that regularly attract out-of-state visitors. Plaintiffs filed 8,882 administrative tort claims against the New York City Police Department alone in the one-year period from July 1, 2010 to June 30, 2011. CITY OF NEW YORK OFFICE OF THE COMPTROLLER CLAIMS REPORT FISCAL YEAR 2011, at 45 (Dec. 27, 2012), *available at* http://www.comptroller.nyc.gov/bureaus/bla/pdf/2012_Claims_Report.pdf. That amounts to approximately one claim per year for every 4 police officers. *See FAQ / Police Administration*, CITY OF NEW YORK POLICE DEPARTMENT, http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml (last visited May 27, 2013). These claims and resulting lawsuits cost New York City $185.6 million dollars in fiscal

year 2011 alone. *See* COMPTROLLER CLAIMS REPORT, *supra* at 45.

B. It is costly and unfair to litigate these cases outside the law-enforcement officer's home state.

Under the Ninth Circuit's rule, officers in heavily trafficked areas will be amenable to suit in virtually any jurisdiction. The facts of this case are a good example. The seizure at issue occurred at the Atlanta airport, which averages more than 250,000 passengers a day. *ATL Fact Sheet: Other Facts*, HARTSFIELD-JACKSON ATLANTA AIRPORT, http://www.atlanta-airport.com/Airport/ATL/ATL_FactSheet.aspx (last visited May 15, 2013). These passengers arrive and depart from more than 150 domestic locations, and 75 international ones. *Id.* A Transportation Security Administration officer will interact with many of these passengers in basic ways—such as checking a driver's license before the traveler enters a secure area. Those officers can be sued virtually anywhere under the lower court's rule. *Cf. Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 317 (1945) ("relevant" to consider "an 'estimate of the inconveniences'" that would result "from a trial away from [the defendant's] 'home'").

The rule adopted by the lower court works significant inconvenience and unfairness on States and municipalities in at least three ways.

1. State and local police departments do not have the resources to defend their officers in far-flung

jurisdictions. The Ninth Circuit was wrong to discount these concerns on the grounds that the officer in this case initially received free representation by the U.S. Department of Justice, "the world's largest law firm with offices in all fifty states." Pet. App. 33a (internal quotation marks omitted). It goes without saying that state attorneys general and local police departments do not have offices in other States. Few of their attorneys are members of the bar in other States. Suits brought against an officer in another State will almost certainly require the officer, an insurer, or the state or local government to find and pay private counsel from another State.

2. Out-of-state litigation against police officers also interferes with related criminal proceedings. Most of the contacts between officers and members of the public involve persons suspected of criminal activity. Novak et al., *supra*, at 355. Many of these contacts will result in criminal trials in the officer's jurisdiction. If the lower court's rule were the law, there could be two different trials—one civil and one criminal—hundreds of miles away from each other to resolve a dispute about a single incident. These trials will require the same evidence and witnesses, including the police officers involved.

3. Travel and administrative costs associated with out-of-state trials can place heavy burdens on state and local governments. The defendant police officers will have to travel out of their jurisdiction, possibly for an extended period of time and may have to pay out-of-pocket for those expenses. During that time these officers will not be performing their

duties. Whether they are out of the workforce on "state time" or vacation time, neither situation is desirable. These "unique burdens" should carry "significant weight" in assessing whether the extension of personal jurisdiction in this case was "reasonable." *Asahi*, 480 U.S. at 114 (O'Connor, J.).

* * *

Some may argue that any limitation on the jurisdiction of state courts is an unjustified intrusion on state sovereignty. But the *amici* States see it differently. Their interests in providing redress for their residents' injuries, regulating conduct that occurs within their territory, and maintaining an efficient and fair interstate-litigation system are best served by a rule that requires more for personal jurisdiction than the contacts in this case. A defendant's knowledge of a plaintiff's place of residence may be relevant to personal jurisdiction under certain circumstances, but it is not alone sufficient. The Due Process Clause "protects the defendant against the burdens of litigating in a distant or inconvenient forum," *World-Wide Volkswagen*, 444 U.S. at 292, and the state and local police officers who keep our communities safe are especially deserving of that protection. It is both unfair and inefficient to subject defendants to personal jurisdiction in the home States of effectively every person with whom they interact. The best result for the *amici* States would be for this Court to reverse the Ninth Circuit's ruling on personal jurisdiction.

CONCLUSION

The Court should reverse the Ninth Circuit.

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AMICUS CURIAE BRIEF

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ANTHONY WALDEN,
Petitioner,
v.
GINA FIORE AND KEITH GIPSON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. Jurisdiction Based On The Effects Of A Nonresident Defendant's Out-Of-State Conduct Requires That The Defendant Expressly Aim That Conduct At The Forum	5
A. The Court Should Narrowly Construe The So-Called Effects Test Due To Its Lack Of Historical Pedigree	8
B. The Ninth Circuit's Formulation Of The Effects Test Does Not Comport With The Due Process Limits On The Exercise Of Personal Jurisdiction	15
1. The purposeful availment requirement serves the dual purpose of constraining assertions of state sovereignty burdening interstate commerce and protecting the liberty of nonresident defendants	16
2. The "metaphor" of the effects test, just like the "metaphor" of the stream-of-commerce theory does not alter the purposeful availment requirement	19

TABLE OF CONTENTS—Continued

Page

C. The Constitutional Standard For The Effects Test Does Not Depend On Whether The Defendant Is Engaged In Commercial Activity 26

D The Prerogative To Expand Available Federal Forums Lies With Congress, Which Has Declined To Authorize The Sweeping Theory Of Jurisdiction Employed By The Ninth Circuit 30

CONCLUSION 32

TABLE OF AUTHORITIES

CASES Page

Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty., 480 U.S. 102 (1987).....*passim*

Atchison, Topeka & Santa Fe Ry. Co. v. Wells, 265 U. S. 101 (1924)..... 28

Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888 (1988) 16, 28

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Burnham v. Superior Court of Cal., Cnty. of Marin, 495 U.S. 604 (1990) 6, 8, 9

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Davis v. Farmers' Co-Op. Equity Co., 262 U.S. 312 (1923)..... 28

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Page(s)

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Rush v. Savchuk, 444 U.S. 320 (1980) 26

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Stafford v. Briggs, 444 U.S. 527 (1980) 31

Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950) .. 18

Washington v. Glucksberg, 521 U.S. 702 (1997) 8

Wolstenholme v. Bartels, No. 11-3767, 2013 WL 209207 (3d Cir. Jan. 18, 2013) (unpublished decision) 26

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STATUTES

Nev. Rev. Stat. §14.065 7

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I § 10 27

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV ..... *passim*

MISCELLANEOUS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel nor any other entity other than *amicus curiae*, its members or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to *amicus* briefs.

members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases of vital concern to the nation's business community, including cases involving the constitutional limits on the exercise of personal jurisdiction. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846 (2011).

This case raises matters of vital concern to the Nation's business community. The proper construction of the so-called effects test for personal jurisdiction implicates more than just whether two transient gamblers can sue a law enforcement officer in Nevada based on his conduct in Georgia. This test also has been employed in an effort to exercise jurisdiction over businesses for various claims, especially product liability claims. Moreover, though this Court principally has relied on the test to support jurisdiction over defendants for certain libel actions, *see Calder v. Jones*, 465 U.S. 783 (1984), some lower courts have consulted the test to decide whether a company's activities over the Internet supply a basis for personal jurisdiction, *see, e.g., Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). *See generally* 4A Charles A. Wright et al., *Federal Practice & Procedure* §1073.1 (3d. ed. 2002). Determining the contours—and limits—of the so-called effects test provides American businesses essential guidance about the jurisdictional consequences of their decisions regarding how they organize their

affairs, sell their products, and conduct activities over the Internet. The Chamber is uniquely positioned to explain the broader commercial implications of the question of constitutional law presented by this case.

SUMMARY OF THE ARGUMENT

The Due Process Clause requires that the defendant expressly aim his conduct *at the forum state* in order for personal jurisdiction to lie based upon the effects of that conduct.[2] Because the Ninth Circuit instead required that a defendant act merely with the "purpose of affecting a particular forum resident or a person with strong forum connections," Pet. App. 18a, this Court should reverse its judgment. In addition to the reasons given in Petitioner's brief, four additional ones justify this outcome.

First, great care must be exercised in the formulation of the effects test. Unlike some other bases for personal jurisdiction, the effects test does not enjoy a well-established historical pedigree. It was not recognized at the time of the Fourteenth Amendment's adoption and indeed only emerged in the middle of the last century. While historical acceptance is not strictly necessary for a theory of personal jurisdiction to comport with the Due Process Clause, defining the constitutionally acceptable boundaries of personal jurisdiction with a healthy respect for the history ensures that "[f]reeform notions of fundamental fairness divorced from traditional practice [do not]

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[2] *Amicus* confines this brief to the first question on which this Court granted certiorari, namely the Ninth Circuit's analysis of the effects test. This brief does not address the second question, the Ninth Circuit's construction of the federal venue statute. That question presents straightforward issues of statutory interpretation fully addressed in the Petitioner's brief.

transform a judgment rendered in the absence of authority into law." *Nicastro*, 131 S. Ct. at 2787 (plurality opinion).

Second, the Ninth Circuit's decision cannot be reconciled with the underlying purposes of the Fourteenth Amendment or this Court's precedents interpreting that Amendment. The Due Process constraints on personal jurisdiction serve a dual function: they prevent extraordinary assertions of state sovereignty that might impede interstate commerce and ensure defendants are on adequate notice of the constitutional consequences of their conduct. To vindicate these dual interests, this Court consistently has required "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). In the specific context of out-of-forum conduct with in-forum effects, these same interests are advanced by a requirement that the defendant "expressly aim[]" his conduct at the forum state. *Calder*, 465 U.S. at 789. Merely requiring some knowledge of a plaintiff's connection with the forum, as the Ninth Circuit has done, can inflame interstate tensions and suck unwitting defendants into unfamiliar forums. Precisely to prevent such results, this Court has never allowed the foreseeability of effects in the forum or the plaintiff's connections to the forum to drive the constitutional analysis.

Third, the Ninth Circuit's test has especially deleterious effects on the business community. It potentially exposes businesses to personal jurisdiction based on commercial conduct never "expressly aimed" at the forum state. Only a more stringent require-

ment of purposeful availment—one that applies with the same stringency regardless of whether the defendant's conduct is "commercial"—averts those consequences.

Finally, to the extent the Court is concerned about the results of a rule that might force some plaintiffs to bring federal claims in the defendant's home forum, it should let Congress make that delicate judgment. With respect to such claims, Congress can control the personal jurisdiction of the federal courts through its enactment of statutes with nationwide or worldwide service of process provisions. Those provisions, according to most lower courts, allow a federal court to consider the defendant's contacts with the United States as a whole. Congress does not always grant such sweeping authorization as to federal claims, including the one at issue here. Such brakes on the personal jurisdiction of the federal courts reflect careful countervailing policy considerations such as the burdens on government officials or federalism principles. The Ninth Circuit's watered-down effects test rips that prerogative from Congress and preempts these sorts of careful policy judgments.

ARGUMENT

I. Jurisdiction Based On The Effects Of A Nonresident Defendant's Out-Of-State Conduct Requires That The Defendant Expressly Aim That Conduct At The Forum.

Since this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), inquiries into personal jurisdiction have followed a familiar two-step framework. First, a court must determine

whether a statute authorizes the exercise of personal jurisdiction. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 105 (1987). In federal courts, like the district court in this case, statutory authorization is essential: Federal courts lack a power under federal common law to authorize personal jurisdiction, even as to claims arising under federal law. *Id.* at 108-11. Second, a court must examine whether the authorized exercise of jurisdiction comports with the Constitution. *Int'l Shoe*, 326 U.S. at 316. At least as to jurisdictional bases that are not "firmly approved by tradition and still favored," *Burnham v. Superior Court of Cal., Cnty. of Marin*, 495 U.S. 604, 622 (1990) (plurality opinion), this inquiry turns on whether the defendant has "certain minimum contacts" with the forum state such that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exists 'minimum contacts' between the defendant and the forum State."); *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

Congress has not enacted a general long-arm statute governing the personal jurisdiction of the federal courts. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 83 (5th ed. 2011). Instead, federal courts have looked to Federal Rule of Civil Procedure 4(k), which links the authorization to exercise personal jurisdiction to the service of a summons (or filing of a waiver of service). In this case, Rule 4(k)(1)(A) supplies the

only possible basis for the Nevada district court's jurisdiction.[3] Therefore, a statutory basis for jurisdiction exists *only* if the petitioner "is subject to the jurisdiction of a court of general jurisdiction in" Nevada. Fed. R. Civ. P. 4(k)(1)(A); *see Omni Capital*, 484 U.S. at 105. Because Nevada has authorized personal jurisdiction to the limits permitted by the United States Constitution, Nev. Rev. Stat. §14.065, the federal court's jurisdiction in this case turns entirely on the constitutional limits imposed on the State of Nevada. *See Omni Capital*, 484 U.S. at 108; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985) (assessing personal jurisdiction of federal court by reference to constitutional constraints on state long-arm); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984) (same); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 713 (1982) (Powell, J., concurring in the judgment).

The panel majority in the Ninth Circuit held that personal jurisdiction in Nevada did not exceed those constitutional limits due to the "effects" in Nevada of the petitioner's conduct in Georgia. In the panel's view, the Constitution required simply that a defendant undertake actions "outside the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections." Pet.

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[3] The other bases for jurisdiction under Rule 4(k) do not apply. The petitioner is not a "joined" party, *see* Fed. R. Civ. P. R. 4(k)(1)(b); a federal statute does not authorize service for *Bivens* claims, *see* Fed. R. Civ. P. 4(k)(1)(c); and the petitioner is subject to the jurisdiction of the courts of at least one state, namely Georgia, *see* Fed. R. Civ. P. 4(k)(2); *Milliken*, 311 U.S. at 462 ("Domicile in the state alone is sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.").

App. 18a. The Court should reject this rule. It runs contrary to history, does not comport with the Court's doctrine, has disastrous commercial consequences, and short-circuits Congress's judgment.

A. The Court Should Narrowly Construe The So-Called Effects Test Due To Its Lack Of Historical Pedigree.

Since this Court's decision in *Pennoyer v. Neff*, 95 U.S. 714 (1877), the constitutional constraints on the exercise of personal jurisdiction emanate primarily from the Due Process Clause. Historical practices inform the meaning of that clause. *See Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."). This is equally true in the personal jurisdiction context. For example, in *Burnham* every Justice agreed that history—in that case, related to establishing personal jurisdiction over nonresident defendants personally served within a state's territory—was "an important factor in establishing whether a jurisdictional rule satisfies due process requirements." 495 U.S. at 629 (Brennan, J., concurring in the judgment); *see also id.* at 622 (plurality opinion); *id.* at 640 (Stevens, J., concurring in the judgment) (citing "the historical evidence and consensus" marshaled by the plurality as part of the reason why *Burnham* presented an easy case). In holding unanimously that in-forum service of process was sufficient to vest general personal jurisdiction over the nonresident defendant, the Court split only over whether long-standing jurisdictional rules automatically fall within the constitutional metes and bounds of due process. *Compare id.* at 622 (plurality opinion) ("[A] doctrine of personal jurisdiction that dates back to the

adoption of the Fourteenth Amendment and is still generally observed unquestionably meets [the constitutional] standard."), *with id.* at 629 (Brennan, J., concurring in the judgment) ("I cannot agree that [history] is the *only* factor such that all traditional rules of jurisdiction are, *ipso facto*, forever constitutional."). *See also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) (noting that the principal opinion in *Burnham* did not independently inquire into the fairness of the basis of personal jurisdiction due to the widespread historical acceptance of in-state personal service).

Unlike the in-state service rule at issue in *Burnham*, other jurisdictional rules, like the so-called effects test, were both strangers to the common law and not well-established at the time of the Fourteenth Amendment's adoption. *See* Restatement (Second) of the Conflict of Laws § 37 cmt. b (1971) (amended 1988) ("The causing of effects in a state by an act done elsewhere was not generally recognized as a basis of judicial jurisdiction at common law. When the question has arisen, the courts have usually held themselves without authority under their local law to exercise jurisdiction on bases not recognized at common law unless authorized to do so by statute."); Willis L.M. Reese & Nina M. Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249, 260-64 (1959) (describing jurisdiction predicated on "causing consequences" in the forum as "unknown to the common law" and "purely the creature of statute"). Such a lack of historical pedigree does not categorically prohibit this Court from approving a jurisdictional rule designed to account for "the fundamental transformation of our national economy over the years."

McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957). But when this Court does so, it must proceed cautiously in order to ensure that "[f]reeform notions of fundamental fairness divorced from traditional practice [do not] transform a judgment rendered in the absence of authority into law." *Nicastro*, 131 S. Ct. at 2787 (plurality opinion).

At common law, "[t]he foundation of jurisdiction [wa]s physical power." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). From this followed the territorial notion of state adjudicative authority embraced most famously in *Pennoyer*. *See* 95 U.S. at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). No state could compel a nonresident defendant to appear in a proceeding *in personam*, even if the harm that would support a judgment occurred in the forum state. Austin W. Scott et al., *Jurisdiction over Nonresidents Doing Business Within a State*, 32 Harv. L. Rev. 871, 872-73 (1919). Only control over the defendant would support jurisdiction. The historical hallmarks of control were service of process upon a defendant present in the state, consent, and state citizenship. *Id.* at 873-74. *See generally* Restatement (First) of the Conflict of Laws §§ 77-86 (1934) (describing early twentieth-century bases for judicial jurisdiction over individuals); 1 Robert C. Casad & William B. Richman, *Jurisdiction in Civil Actions* § 2-2, at 68 (3d ed. 1998) (same); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241 (discussing common-law history of constraints on adjudicatory jurisdiction); *Developments in the Law—State Court Jurisdiction*, 73 Harv. L. Rev. 909, 915-16 (1959-1960) (same).

Common-law bases for jurisdiction over non-resident corporations were even more austere. While the state of incorporation enjoyed jurisdiction over the company, other states generally did not. In such cases, personal jurisdiction depended upon their consent. *See generally* Restatement (First) of the Conflict of Laws §§ 87-93 (1934) (describing early twentieth-century bases for judicial jurisdiction over corporations). In-forum personal service was impossible, even upon principal corporate officers, because their corporate functions and authority stopped at the state of incorporation's border. *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, 7 (N.Y. Sup. Ct. 1819); *Peckham v. North Parish*, 33 Mass. (16 Pick.) 274, 286 (1834); *see also Goldey v. Morning News of New Haven*, 156 U.S. 518, 521-22 (1895) (noting that state court judgments "against a corporation neither incorporated nor doing business within the state" are invalid and unenforceable, "unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with *any* business of the corporation there").

As a result, states passed statutes authorizing jurisdiction over foreign corporations "doing business" within the state. *See generally* Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 Rev. Litig. 239, 247-48 & nn.27, 29 (1988). While determining when a corporation was "doing business," like applying all shorthand descriptors, proved difficult, *see* Restatement (First) of the Conflict of Laws § 167 (1934), the basic rule was that the nature and character of the corporation's in-forum business must be sufficient "to warrant the inference that the corporation has subjected itself to the local jurisdic-

tion, and is by its duly authorized officers or agents present within the state or district where service is attempted," *People's Tobacco Co. v. Am. Tobacco Co.*, 246 U.S. 79, 87 (1918). *See generally* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the* In Personam *Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958) (discussing historical categories of adjudicatory jurisdiction over corporations during *Pennoyer* era). Such "doing business" jurisdiction generally did not support jurisdiction in products-liability actions based on the effects of out-of-state conduct absent some in-state activity such as solicitation, sales, or delivery. *See* David P. Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 547.

Encouraged by this Court's decision in *Hess v. Pawolski*, 274 U.S. 352, 357 (1927), rejecting a Fourteenth Amendment due process challenge to a Massachusetts' nonresident-motorist statute, states began to enact broader "long-arm" or "single-tort" statutes. *See generally* 4 Charles A. Wright et al., *Federal Practice and Procedure* § 1068 (3d ed. 2002) (discussing the proliferation and increasingly broad aspects of these statutes). Illinois became the first state to enact a comprehensive long-arm statute in 1955. *See generally* Currie, 1963 U. Ill. L.F. 532 (discussing the history of the Illinois long-arm statute). Other states followed suit. *See* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. Rev. 491, 494-98 (2004); Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. Rev. 33, 52 (1978).

What began as a way for states to protect their citizens by ensuring that nonresident motorists could not escape liability for their *in-forum* tortious conduct by retreating to their home states later became a means by which states (or federal courts standing in the shoes of state courts) could assert jurisdiction over certain *out-of-forum* tortious conduct that has effects in the forum state. As with the above-described "doing business" fiction, this basis for extraterritorial assertions of state adjudicative authority was entirely statutory. Restatement (Second) of Conflict of Laws § 37 cmt. b (1971) (amended 1988).

An early example of a long-arm statute reaching out-of-state conduct with adverse in-forum effects is *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961). There, the Illinois Supreme Court interpreted that state's long-arm statute and found that its courts did not violate due process by reaching a nonresident corporation whose only state contact was the manufacture of a part in Ohio that was incorporated by a third party into a product in Pennsylvania, which, in turn, was sold to an Illinois customer. *Id.* at 764, 767. The state supreme court concluded that due process would not be offended by exercising personal jurisdiction over the nonresident part manufacturer because: Illinois law applied to the substantive questions, *id.* at 766-67; Illinois provided likely provided the most convenient forum, *id.* at 767; it was reasonable to infer that the nonresident part manufacturer's "commercial transactions . . . result in substantial use and consumption in [Illinois]," *id.* at 766; and insofar as the nonresident part manufacturer directly benefited from in-state commercial transactions, it "undoubtedly benefited, to a degree" from Illinois' marketing laws, however indirect that benefit may

have been, *id.* Construed as the *Gray* court did, the reach of a state long-arm statute is indeed long.

But not all long-arm statutes applied so broadly. A year after *Gray*, the National Conference of Commissioners on Uniform State Laws approved the Uniform Interstate and International Procedure Act. Though later withdrawn, *see* McFarland, 84 B.U. L. Rev. at 495-96 & nn.14-15, the Uniform Act repudiated the *Gray* court's approach to effects-based jurisdiction. Under the Commissioners' chosen language:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a [cause of action] [claim for relief] arising from the person's . . . causing tortious injury in this state if he regularly does or solicits business, or engaged in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.

Unif. Interstate & Int'l Pro. Act § 1.03(a)(4) (withdrawn 1977). In the comments accompanying the model statute, the Commissioners noted that the model language was based on Wisconsin's long-arm statute. *Id.* cmt. They also underscored that this "rule [wa]s more restrictive than the Illinois statute, as interpreted in *Gray*." *Id.* This is because the model statute requires "some other reasonable connection between the state and the defendant" besides in-forum harm to a forum resident, but that additional in-forum conduct need not be related to the act or omission that caused the harm. *Id.* By framing the statute this way, the Commissioners ensured that the state's adjudicative authority could reach the nonresident corporation consistent with the require-

ments of due process encapsulated by the *International Shoe* standard for at least some conduct *before* adding an additional circumstance where jurisdiction was possible.

The upshot of this historical survey is clear. At the time of the Fourteenth Amendment's adoption, the so-called effects test was not well-established. Even as the demarcations set by *Pennoyer* began to change in the early twentieth century, personal jurisdiction based solely on the in-forum effects of out-of-forum conduct was not widely embraced. When it finally began to emerge in the middle of the twentieth century, there was hardly widespread consensus on its contours. This relatively recent genesis of the effects test counsels great caution in the Court's construction of it.

B. The Ninth Circuit's Formulation Of The Effects Test Does Not Comport With The Due Process Limits On The Exercise Of Personal Jurisdiction.

Although this Court first upheld personal jurisdiction based on the effects of out-of-state conduct barely thirty years ago, *see Calder*, 465 U.S. 783 (1984), the Ninth Circuit displayed none of the caution required when applying a personal jurisdiction test of relatively recent vintage. Instead, the panel majority derived a test that sapped the constitutional constraints of any meaning. Specifically, the court below eviscerated the fundamental requirement of purposeful availment and replaced it with a conception of "effects" irreconcilable with this Court's prior precedents.

1. The purposeful availment requirement serves the dual purpose of constraining assertions of state sovereignty burdening interstate commerce and protecting the liberty of nonresident defendants.

While the contours of the constitutional constraints have shifted from a focus on concepts such as "presence," "consent," or "doing business," *see, e.g., Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), to a focus on the defendant's "contacts" with the forum, the underlying *purposes* served by those constraints remain unchanged. At bottom, those purposes are twofold. First, the Fourteenth Amendment "acts to ensure that the States through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Woodson*, 444 U.S. at 292; *see also Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (Due Process constraints "are a consequence of territorial limitations on the power of the respective States."). This first purpose helps to ensure that aggressive assertions of state jurisdiction do not frustrate the "economic interdependence of the States" or the development of the Nation as a "common market, a 'free trade unit' in which the States are debarred from acting as separable economic entities." *Woodson*, 444 U.S. at 293; *see also Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988) (describing significant burden on interstate commerce posed by exorbitant assertions of personal jurisdiction under state law); *McGee*, 355 U.S. at 222-23 (describing relationship between constitutional constraints on personal jurisdiction and economic development of the Nation). Second, the Fourteenth Amendment protects the liberty of the nonresident

defendant over whom the forum asserts its authority. *See Nicastro*, 131 S. Ct. at 2787 (plurality opinion); *Ins. Corp. of Ireland*, 456 U.S. at 702-03 & n.10. This protection enables the defendants to organize their affairs in a manner so that they do not unwittingly bear "the burdens of litigating in a distant or inconvenient forum." *Woodson*, 444 U.S. at 292; *see also Burger King*, 471 U.S. at 475-76.

To vindicate these dual interests, this Court has repeatedly required "some act by which the defendant purposefully avails itself of the privilege of *conducting activities within the forum State*, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253 (emphasis added); *see also Kulko v. Superior Court of Cal., City & Cnty. of S.F.*, 436 U.S. 84, 94 (1978); *Burger King*, 471 U.S. at 474-75; *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102, 109 (1987) (plurality opinion); *Nicastro*, 131 S. Ct. at 2787 (plurality opinion).[4] To be sure, the constitutional boundaries of personal

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[4] The requirement of purposeful availment has arisen in the context of specific jurisdiction, that is, cases where the plaintiff's claims bear a sufficient relation to the defendant's contacts with the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). This contrasts with general jurisdiction where the defendant by virtue of some status (such as citizenship or domicile) or conduct (such as consent) is amenable to jurisdiction in the forum state irrespective of any relationship between the plaintiff's claim and the defendant's contacts. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853-54 (2011). This case does not involve principles of general jurisdiction but, instead, turns entirely on principles of specific jurisdiction. *See generally* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-64 (1966) (explicating the difference between general and specific jurisdiction).

jurisdiction have not always turned on whether the defendant actually engaged in conduct in the forum state. In *McGee*, this Court approved the California court's assertion of jurisdiction over a Texas insurance corporation that had solicited by mail renewal of an insurance policy. *See* 355 U.S. at 223-24; *see also Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 648 (1950). Likewise, in *Burger King*, this Court held that personal jurisdiction could constitutionally lie in Florida where the defendant "deliberately reached out beyond Michigan" and negotiated a long-term contract with a Florida corporation that "envisioned continuing and wide-reaching contacts with Burger King *in Florida*." 471 U.S. at 480 (emphasis added). *McGee* and *Burger King* thus establish that out-of-state conduct can satisfy the purposeful availment requirement when that conduct is expressly directed *at the forum state*.

By contrast, this Court has been unwilling to approve an exercise of personal jurisdiction where the defendant did not expressly aim its conduct *at the forum state*. For example, in *Hanson*, this Court held that the Due Process Clause did not support personal jurisdiction over a Delaware-based trustee where the trustee did not "perform[] any acts *in Florida* that bear the same relationship to the [trust] agreement as the solicitation in *McGee*." 357 U.S. at 252 (emphasis added). Likewise, in its decisions addressing the stream-of-commerce theory, the Court made clear that the purposeful availment requirement remains fully applicable. Just like cases predicated on effects jurisdiction, those cases involved situations where the defendants had engaged in conduct elsewhere that eventually had some effect in the forum state. *See Goodyear*, 131 S. Ct. at 2855.

In *Woodson*, this Court found that the purposeful availment requirement was not satisfied because the defendants did not sell products in Oklahoma, perform services there, solicit business there, or advertise there. 444 U.S. at 295. In *Asahi*, the plurality found that requirement not satisfied because the third-party defendant did not engage in "[a]dditional conduct" that "indicate[d] an intent or purpose to serve the market in the forum State" such as designing products for the forum state, advertising in the forum state, advising customers in the forum state, or indirectly marketing in the forum state. 480 U.S. at 112; *see also id.* at 122 (Stevens, J., concurring in part and concurring in the judgment). Finally, in *Nicastro*, a majority of this Court found that the purposeful availment requirement was not satisfied. *See* 131 S. Ct. at 2790 (noting that defendant did not "engage[] in conduct purposefully directed at" the forum state); *id.* at 2793 (Breyer, J., concurring in the judgment and joined by Alito, J.) (finding "no specific effort by the [defendant] to sell in [the forum state]").

2. The "metaphor" of the effects test, just like the "metaphor" of the stream-of-commerce theory does not alter the purposeful availment requirement.

These "stream of commerce" decisions serve as an important reminder that a "metaphor," *Goodyear*, 131 S. Ct. at 2855, does not water-down the requirements of the Due Process Clause or otherwise "amend the general rule of personal jurisdiction," *Nicastro*, 131 S. Ct. at 2788 (plurality opinion). Even where the defendant engages in conduct outside the forum state, the constitutional requirement of pur-

poseful availment endures. As the *Asahi* plurality explained, "[t]he substantial connection between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*." 480 U.S. at 112 (citation and internal quotations omitted).

Much like the stream-of-commerce theory, the so-called effects test has assumed a metaphor-like quality. That quality has "its deficiencies as well as its utility." *Nicastro*, 131 S. Ct. at 2788 (plurality opinion). It supplies a helpful bit of terminology to describe a particular class of cases—a nonresident defendant's tortious conduct outside the forum having an effect in the forum state. But just like the stream of commerce "metaphor," the effects "metaphor," however useful as a shorthand, does not "amend the general rule of personal jurisdiction." *Id.* Two cases, both arising from the California courts, establish this proposition.

In *Kulko*, this Court considered whether a California court could constitutionally exercise personal jurisdiction over a child support and child custody dispute brought by a California mother against the father, a resident of New York. The California court had permitted the exercise of jurisdiction based on the "effects" of the father's decision to send their child to live with her mother in California. On review, this Court first concluded that the father's conduct did not satisfy the purposeful availment requirement of the Due Process Clause. 436 U.S. at 92-96. Having so concluded, this Court then quickly disposed of the California court's reliance on the effects test. It found the California court's reliance on the effects test "misplaced" precisely because the defendant's

conduct could not independently satisfy this Court's purposeful availment requirement. *Id.* at 96. *Kulko*, thus, makes clear that the effects "metaphor" does not replace the requirement of purposeful availment.

Six years later, the Court returned to the constitutionality of California's effects test in *Calder v. Jones*, 465 U.S. 783 (1984). *Calder* involved libel and other common-law intentional tort claims brought in California court against two Florida residents, a reporter and an editor of a nationally circulating periodical; the claims stemmed from the publication of an article in the periodical. Unlike in *Kulko*, the Court in *Calder* found that the nonresident defendants had sufficient minimum contacts and thus satisfied the *International Shoe* standard. 465 U.S. at 790 (acknowledging the need for individual assessment of each defendant's forum-state contacts under the *International Shoe* standard before holding that jurisdiction over the defendants was proper under the circumstances). The Court stressed that the mere "foreseeability" of an effect in California would be insufficient to support personal jurisdiction under the Due Process Clause. *Id.* at 789. Rather, critical in the Court's view was that the defendants' "intentional, and allegedly tortious, actions were *expressly aimed at California*." *Id.* (emphasis added). The Court anchored this conclusion in several critical facts: the allegedly libelous story "concerned the California activities of a California resident;" it "impugned the professionalism of an entertainer whose television career was centered in California;" it was drawn from California sources;" and "the brunt of the harm . . . was suffered in California." *Id.* at 788-89.

Read together, *Kulko* and *Calder* make clear that the so-called effects test, just like the stream-of-commerce theory, still requires the requisite degree of purposeful conduct directed *at the forum state*. *See also* Pet. App. 82a-84a (O'Scannlain, J., dissenting from the denial of rehearing en banc and joined by four other circuit judges) (explaining the conflict between the panel opinion and *Calder*). In holding otherwise, the panel majority in the Ninth Circuit fell into the trap of focusing on the "metaphor" of effects rather than this doctrinal requirement of purposeful availment. While initially citing the proper requirement—that the plaintiff must have "expressly aimed at the forum state," Pet. App. 16a—the panel majority promptly ignored it. Instead, it held that due process was satisfied where the defendant undertook actions "outside the forum state for the purpose of affecting a particular forum resident or a person with strong forum connections." Pet. App. 17a-18a. In the court's view, it was entirely immaterial whether the plaintiffs "were legal residents of [the forum state] or whether they simply had a significant connection to the forum." Pet App. 22a-23a. Nor was it "relevant who *initiated* the contacts with [the forum]." Pet. App. 24a. As Judge Ikuta recognized in his dissent, this view "unwisely broadens the scope of personal jurisdiction." Pet. App. 58a; *see also* Pet. App. 77a (O'Scannlain, J., dissenting from the denial of rehearing en banc and joined by four other circuit judges).

Specifically, the decision flouts several well-established principles of this Court's constitutional jurisprudence. First, as the seven judges dissenting from the denial of en banc review recognized, the panel majority's decision attempts to return "to a discredited era of specific personal jurisdiction, where

foreseeability reigns supreme and purposeful direction is irrelevant." Pet. App. 91a. This Court consistently has held that the mere foreseeability that the defendant's conduct might have an effect in another state does not satisfy the strictures of the Due Process Clause. *Woodson* stated this most clearly when it declared that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." 444 U.S. at 295. The Court found support for this principle in both *Hanson* and *Kulko*:

> In *Hanson* . . . it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally exercise jurisdiction over a Delaware trustee that had no other contacts with the forum state. In *Kulko* . . . it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.

444 U.S. at 295-96. After *Woodson*, members of this Court again relied on this rule to reject jurisdiction in the stream-of-commerce cases that, as noted above, depended ultimately on claims that conduct undertaken outside the forum state made the defendant amenable to personal jurisdiction based on the felt effects of that conduct in the forum state. *See Nicastro*, 131 S. Ct. at 2783-84 (plurality opinion); *Asahi*, 480 U.S. at 112-13 (plurality opinion).

Paying lip service to the foreseeability rule, Pet. App. 18a, the panel majority attempts to evade the undeniable conflict by claiming that "the critical factor is whether [the defendant], knowing of the [plaintiffs'] significant connections to [the forum state], should be taken to have intended that the consequences of his actions would be felt by them in that state," Pet. App. 24a. But this "critical factor," just like the foreseeability rule urged by the plaintiffs in *Woodson* (and rejected there by the Court), also cannot be squared with *Hanson* and *Kulko*. The trustee in *Hanson knew* that the settlor, Mrs. Donner, was a resident of the forum (Florida) for part of the time it was managing the trust. *See* 357 U.S. at 252 (noting that trustee remitted income to settlor in Florida). The actions it undertook in Delaware—maintenance of the trust funds and remittance of trust funds—unquestionably had the "purpose of affecting" a specific individual (Mrs. Donner) at the time she was a known forum resident. Despite these facts, the *Hanson* Court concluded that the Due Process clause did not support the exercise of personal jurisdiction. *Kulko* is to the same effect. The father in *Kulko*, just like the trustee in *Hanson*, *knew* that the plaintiff, his ex-wife, was a resident of the forum (California) for the period following their divorce. *See* 436 U.S. at 87 (noting that daughter told father she wanted to remain with mother in California). The actions he undertook in New York—sending his child to California in fulfillment of her wishes to live with her mother—also had the "purpose of affecting" a specific individual (his wife) at the time she was a known forum resident. Here too, though, the *Kulko* Court declined to find the state court's exercise of personal jurisdiction comported with the Due Process Clause.

Second, the Ninth Circuit panel majority's emphasis on the plaintiffs' "strong forum connections" gives relevance to the unilateral activities of the plaintiff, contrary to the principle that the plaintiffs' contacts with the forum state do not drive the Due Process analysis. This Court's decision *Helicopteros Nacionales de Colombia, S.A. v. Hall* made that point crystal clear: "Unilateral activity of another party or a third person [is] not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." 466 U.S. 408, 417 (1984). While the *Helicopteros* Court articulated this principle in a case involving general jurisdiction, this Court's decisions involving specific jurisdiction rest on that same principle. Indeed, *Helicopteros* cited several specific jurisdiction decisions to support the proposition. *Id.* For example, *Hanson* made this point most clearly when it declared that "[t]he unilateral activity of those who claim some relationship with the nonresident defendant cannot satisfy the requirement of contact with the forum state." 357 U.S. at 253. *Kulko* did likewise when it declined to uphold personal jurisdiction based on the mother's decision to move to California. 436 U.S. at 94. *Woodson* reaffirmed the principle in the commercial context when it rejected any claim that the Oklahoma courts could exercise personal jurisdiction over the New England-based defendants for the purchaser's act of driving the automobile onto highways in Oklahoma. 444 U.S. at 298. Following *Hanson*, *Kulko*, and *Woodson*, numerous other decisions of this Court repeatedly emphasize that it is the defendant's conduct, not the plaintiff's, that supplies the relevant source material for the jurisdictional inquiry. *See Burger King*, 471 U.S. at 475 ("Jurisdiction is proper

. . . where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum state.") (internal quotations omitted); *Rush v. Savchuk*, 444 U.S. 320, 329 (1980) ("It cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable"); *cf. Keeton*, 465 U.S. at 779 ("[W]e have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant.").

In sum, consistent with the caution used to assess theories of personal jurisdiction that lack a well-established historical pedigree, this Court should reaffirm that the so-called effects test does not alter the constitutional requirement of purposeful availment. In the context of out-of-state conduct, this requirement means that the defendant must expressly aim that conduct *at the forum state*. The contrary conclusion of the Ninth Circuit's panel majority—permitting personal jurisdiction whenever the defendant targets a plaintiff with significant forum connections—cannot be squared with this Court's precedents or their underlying purposes.

C. The Constitutional Standard For The Effects Test Does Not Depend On Whether The Defendant Is Engaged In Commercial Activity.

Personal jurisdiction based on the effects test matters for a variety of commercial activities. These include such everyday matters as product sales, internet exchanges, publishing, and shareholder relations. *See* Petr's Brief at 37-40; *Wolstenholme v. Bartels*, No. 11-3767, 2013 WL 209207 (3d Cir. Jan.

18, 2013) (unpublished decision). Given this variety of activities implicated by the effects test, it is especially important that this Court announce a clear rule not dependent on the precise factual scenario presented by this case.

Specifically, this Court should make clear that the constitutional requirements of the effects test do not depend on whether the underlying activity is "commercial" or "noncommercial." In *Kulko*, the Court traced California's effects test to Section 37 of the Restatement (Second) of the Conflict of Laws and read the Restatement's examples to suggest that its formulation "was intended to reach . . . commercial activity affecting state residents." 436 U.S. at 96. Neither the language of Section 37 nor its official commentary actually distinguishes between "commercial" and "noncommercial" activity. *See* Restatement (Second) of the Conflict of Laws (1971) (amended 1988). But even if *Kulko* correctly interpreted Section 37, the Restatement "is not binding on this Court," 436 U.S. at 96, and any interpretation resting on the distinction between "commercial" and "noncommercial" activity should be rejected for several reasons.

First, the text of the Fourteenth Amendment surely does not lend itself to any such distinction. It speaks simply in terms of a prohibition against a State depriving a person of property without due process of law. Elsewhere, the drafters of the Constitution indicated their awareness of how to single out commercial conduct for a separate set of rules. *See, e.g.*, U.S. Const. Art. I, § 10 (prohibiting state interference with the obligations of contract). Their failure to do so here counsels against this Court grafting a

separate set of "commercial" rules onto the effects test.

Second, to lower the bar on the effects test for commercial transactions runs contrary to the purposes of the constitutional constraints on personal jurisdiction. As noted above, a core purpose of the constitutional constraints on the exercise of personal jurisdiction is to prevent state assertions of jurisdiction over nonresident defendants from engendering antagonisms between the states and interfering with a fully integrated commercial republic. *See supra* at 16-17. Indeed, this Court in a series of opinions by Justice Brandeis found some exercises of personal jurisdiction under state law to be so burdensome as to amount to an unconstitutional interference with interstate commerce. *See, e.g., Mich. Cent. R.R. Co. v. Mix*, 278 U.S. 492, 495-96 (1929); *Atchison, Topeka & Santa Fe Ry. Co. v. Wells*, 265 U.S. 101, 103-04 (1924); *Davis v. Farmers' Co-Op. Equity Co.*, 262 U.S. 312, 315-17 (1923). And this line of precedent may have "continuing vitality." *Scanapico v. Richmond, Fredericksburg & Potomac R.R. Co.*, 439 F.2d 17, 25-26 (2d Cir. 1970) (en banc) (Friendly, J.). *Compare Bendix Autolite*, 486 U.S. at 893 (recognizing the burdens on interstate commerce posed by excessive assertions of personal jurisdiction under state law), *with Calder*, 465 U.S. at 790-91 (rejecting "the suggestion that First Amendment concerns enter into the jurisdictional analysis"). *See generally* Restatement (Second) of Judgments § 4 cmt. e & Reporter's Note (1982) (noting debate over whether other constitutional provisions apart from the Due Process Clause limit the exercise of personal jurisdiction under state law). To make it easier to assert personal jurisdiction over the effects of commercial transactions—as opposed to noncommercial ones—

thwarts, rather than facilitates, this purpose of the due process constraints on personal jurisdiction. *See* Russell J. Weintraub, *Commentary on the Conflict of Laws* 287-91 (6th ed. 2010) (noting that burdens on commerce of an assertion of judicial jurisdiction under state law may appropriately tip the scales in the due process inquiry).

Finally, establishing a separate rule for commercial transactions flies in the face of this Court's precedents. Certainly since the time of *International Shoe*, and even earlier, this Court's articulation of the due process limits on judicial jurisdiction has not differentiated between commercial and noncommercial conduct. *International Shoe* itself involved the effects a commercial transaction consummated elsewhere—the sale of shoes by contract formed in Missouri—and nothing in the Court's opinion suggests that its formulation of the minimum contacts test was meant to vary with the nature of the transaction. On the contrary, *International Shoe* made clear that the Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual *or corporate defendant* with which the state has no contact, ties, or relations." 326 U.S. at 319 (emphasis added) (citing *Pennoyer v. Neff* and *Minn. Commercial Men's Ass'n v. Benn*, 261 U.S. 140 (1923)). Since *International Shoe*, this Court's precedents on the constitutional limits on personal jurisdiction have not held—much less hinted at—distinct rules for commercial and noncommercial conduct. *Compare Calder*, 465 U.S. at 789-90, *with Woodson*, 444 U.S. at 291-94.

To hold that effects test differentiates between commercial and noncommercial conduct runs directly

contrary to this Court's precedents involving the stream-of-commerce theory. As noted above, those precedents all involved the same underlying fact pattern at issue here—out-of-state conduct allegedly having an effect in the forum state. *See supra* at 18-19. That conduct, of course, occurred in the context of commercial transactions. Yet in each case, when it held that the Constitution did not support the exercise of personal jurisdiction, the Court nowhere intimated that the test had somehow been watered-down by virtue of the fact that a commercial transaction was at issue.

At bottom, then, the constitutional contours of the effects test should not be any weaker in cases where the defendant's out-of-state conduct happens to involve commercial activity.

D. The Prerogative To Expand Available Federal Forums Lies With Congress, Which Has Declined To Authorize The Sweeping Theory Of Jurisdiction Employed By The Ninth Circuit.

It may be complained that requiring express aiming at the forum state will frustrate plaintiffs' efforts to obtain relief in a local forum and will undermine their home states' interests in making that forum available. But that complaint is more appropriately addressed to Congress, not to the courts.

Congress surely has the power to authorize personal jurisdiction over claims arising under federal law, *see Omni Capital*, 484 U.S. at 104-08, and "knows how to authorize nationwide service of process when it wants to provide for it," *id.* at 411. When Congress has enacted a statute authorizing nationwide or worldwide service of process, lower

courts generally have held that they may consider the defendant's contacts with the United States as a whole. *See* Born & Rutledge, *International Civil Litigation in United States Courts*, at 203-15. Though never officially approved by a majority of this Court, *see Asahi*, 480 U.S. at 113 n.*, these nationwide contacts tests illustrate the truism that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," *Nicastro*, 131 S. Ct. at 2789 (plurality opinion); *see also Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) ("[D]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court.").

Yet in many other cases, including both the *Bivens* claim at issue here and state-law tort claims, Congress has not sought to authorize such a sweeping exercise of personal jurisdiction. This cautious approach may reflect an awareness of the special burdens put upon government officials if they are forced to defend themselves in unfamiliar forums. *See Stafford*, 444 U.S. at 544 (majority opinion). It may reflect a strong form of federalism—namely that federal district courts located in a state should not be available to hear claims when the Constitution precludes the exercise of personal jurisdiction by local trial courts in that same state. *See Insurance Corp. of Ireland*, 456 U.S. at 711-12 & n.3 (Powell, J., concurring in the judgment). Whatever the reason, these are delicate judgments made, in the first instance, by Congress, and there is no reason for the federal courts to short-circuit those careful policy determinations about the scope of personal jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether due process permits a court to exercise personal jurisdiction over a defendant whose sole "contact" with the forum State is his knowledge that the plaintiff has connections to that State.

2. Whether the judicial district where the plaintiff suffered injury is a district "in which a substantial part of the events or omissions giving rise to the claim occurred" for purposes of establishing venue under 28 U.S.C. § 1391(b)(2), even if the defendant's alleged acts and omissions all occurred in another district.

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. AFFIRMANCE WOULD ADVERSELY AFFECT FEDERAL LAW ENFORCEMENT OFFICERS, THE AGENCIES FOR WHICH THEY WORK, AND THE PUBLIC THEY SERVE AND PROTECT 4

A. The Ninth Circuit's Decision Expands Personal Jurisdiction Beyond The Boundaries Of The Due Process Clause 5

B. The Ninth Circuit's Unbounded Theory Of Personal Jurisdiction Will Disproportionately Harm Federal Law Enforcement Officers 8

C. The Ninth Circuit's Unwarranted Expansion Of Personal Jurisdiction Comes At A Substantial Cost Not Only To Individual Officers, But Also To The Public They Serve 14

II. A RULING ON VENUE IS INSUFFICIENT TO PROTECT LAW ENFORCEMENT OFFICERS 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Creighton,
483 U.S. 635 (1987) 12, 14, 16

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 2, 17

Bogan v. Scott-Harris,
523 U.S. 44 (1998) 14

Brayton Purcell LLP v. Recordon & Recordon,
606 F.3d 1124 (9th Cir. 2010) 13

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 5, 10

Calder v. Jones,
465 U.S. 783 (1984) 6

Crawford-El v. Britton,
523 U.S. 574 (1998) 13

Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,
514 F.3d 1063 (10th Cir. 2008) 6

ESAB Grp., Inc. v. Centricut, Inc.,
126 F.3d 617 (4th Cir. 1997) 6

Gregoire v. Biddle,
177 F.2d 579 (2d Cir. 1949) 16

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 8, 14, 16, 17

Hunter v. Bryant,
502 U.S. 224 (1991) 13

IMO Indus., Inc. v. Kiekert AG,
155 F.3d 254 (3d Cir. 1998) 6

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) 5

Johnson v. Arden,
614 F.3d 785 (8th Cir. 2010) 6

Licciardello v. Lovelady,
544 F.3d 1280 (11th Cir. 2008) 20

Leroy v. Great W. United Corp.,
443 U.S. 173 (1979) 19

Metro. Life Ins. Co. v. Neaves,
912 F.2d 1062 (9th Cir. 1990) 13

Mitchell v. Forsyth,
472 U.S. 511 (1985) 13

Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.,
623 F.3d 440 (7th Cir. 2010) 6

Noonan v. Winston Co.,
135 F.3d 85 (1st Cir. 1998) 6

Panda Brandywine Corp. v. Potomac Elec. Power Co.,
253 F.3d 865 (5th Cir. 2001) 6

Polizzi v. Cowles Magazines, Inc.,
345 U.S. 663 (1953) 19

Reynolds v. Int'l Amateur Athletic Fed'n,
23 F.3d 1110 (6th Cir. 1994) 6

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995) 17

Stafford v. Briggs,
444 U.S. 527 (1980) 18

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 5

STATUTES

28 U.S.C. § 1391 ..... *passim*

28 U.S.C. § 1404 19

28 U.S.C. § 1441 ..... 3, 4, 19

RULE AND REGULATION

Fed. R. Civ. P. 12(h)(1) 13

28 C.F.R. § 50.15 ..... 11, 12

OTHER AUTHORITIES

9 Op. Att'y Gen. 51 (1858) 16

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97th Cong. 144 (1982) 9, 15, 16

Indemnification of Dep't of Justice Emps.,
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INTEREST OF THE AMICUS CURIAE[1]

The Federal Law Enforcement Officers Association (FLEOA), formed in 1977, is a nonpartisan and nonprofit professional association exclusively representing federal law enforcement officers. FLEOA was formed to represent the interests of its members in legislative, regulatory, and judicial forums. FLEOA serves as an advocate for its members on matters ranging from pay and benefits to the policies necessary for federal law enforcement officers to be most effective in their efforts to combat crime, terrorism, and other threats to the public.

FLEOA currently represents over 25,000 federal law enforcement officers from 65 federal agencies, including the U.S. Supreme Court Police; U.S. Marshals Office; U.S. Secret Service; Transportation Security Administration's Federal Air Marsnals; U.S. Forest Service, Law Enforcement and Investigation Organization; Smithsonian Zoological Park Police; Bureau of Land Management, Law Enforcement; National Park Service, United States Park Police and Visitor and Resource Protection Division; Bureau of Alcohol, Tobacco, Firearms and Explosives; Bureau of Engraving and Printing Police; and U.S. Mint Police.

Investigating and thwarting security threats exposes federal law enforcement officers to suits for

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[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief. All parties consent to the filing of this brief by virtue of blanket consent letters filed on March 7 and 12, 2013 by Petitioner and Respondents, respectively.

constitutional torts, frivolous or otherwise. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The national focus of federal agencies' jurisdiction means that the vast majority of federal law enforcement officers encounter nonlocal citizens on a daily basis.

Requiring federal law enforcement officers to defend against lawsuits in a distant State based on little more than the knowledge that a particular citizen resides in or has "significant connections" to that State would not only violate FLEOA members' constitutionally guaranteed right to fairness in the litigation process, but would decrease the ability of these members to protect the safety and security of the United States and its citizens. Affirming the Ninth Circuit's decision would also increase the costs—monetary and otherwise—to FLEOA members, the agencies for which they work, and the public as a whole. Accordingly, FLEOA respectfully submits that this Court should reverse the decision below, and reaffirm that an intentional act taken with knowledge that a plaintiff has connections to the forum is not a sufficient basis for personal jurisdiction.

SUMMARY OF ARGUMENT

I. Contrary to this Court's established law, the Ninth Circuit erroneously held that Nevada may exercise personal jurisdiction over petitioner based on his alleged "'individual targeting' of forum residents." Pet. App. 17a; *id.* at 20a. If allowed to stand, this rule would burden federal law enforcement officers with unwelcome, unforeseen, and fundamentally unfair costs. The Ninth Circuit's decision trivializing these costs misunderstands government representation and indemnification of individual officer defend-

ants, and underestimates the significant personal and social costs of such litigation.

The consequences of the Ninth Circuit's ruling are especially severe for federal law enforcement officers who perform their essential missions by directing actions at people and property from across the country. The Ninth Circuit's boundless theory of personal jurisdiction would expose these officers to increased monetary and personal costs of defending suits in distant forums, as well as exact significant social costs by diverting federal resources from pressing matters of public concern, tainting the exercise of official discretion with calculations of personal risk, and hindering the recruiting and retention efforts of federal agencies across the country. The Constitution does not permit such a result for good reason: The costs to our nation's security and to those who ensure it are too great.

The repercussions are not limited to personal jurisdiction. The Ninth Circuit's ruling could diminish the value of other important protections afforded officers in litigation, including the qualified-immunity defense and statutory restrictions on venue.

II. Although the court of appeals wrongly decided that venue was proper in the District of Nevada, a reversal on personal-jurisdiction grounds is the only way to provide uniform relief from the decision below. Reversing the Ninth Circuit's erroneous interpretation of the general venue statute, 28 U.S.C. § 1391(b), would provide little help in cases originally filed in state court, but later removed to federal court under 28 U.S.C. § 1441(a). Once a case is removed, venue may lie in the district of the State in which the plaintiff originally filed, even if venue would have been improper there as an original matter. Without

appropriate limits on personal jurisdiction, Section 1441(a) would permit plaintiffs to evade Section 1391(b) and this Court's venue holding. For this reason, this Court should reverse the Ninth Circuit's holding that Nevada had personal jurisdiction over petitioner.

ARGUMENT

I. AFFIRMANCE WOULD ADVERSELY AFFECT FEDERAL LAW ENFORCEMENT OFFICERS, THE AGENCIES FOR WHICH THEY WORK, AND THE PUBLIC THEY SERVE AND PROTECT.

As the flurry of dissenting opinions below make clear, the Ninth Circuit's anomalous decision—that the Due Process Clause is satisfied so long as a defendant's actions allegedly were "targeted at a known individual who has a substantial, ongoing connection to the forum" (Pet. App. 19a)—jettisoned established due process principles by subjecting petitioner to suit in a distant forum with which he has no contacts, ties, or connections. That "virtually limitless expansion of personal jurisdiction" cannot be reconciled with the due process guarantee of basic fairness or Supreme Court precedent. Pet App. 91a (McKeown, J., dissenting from denial of reh'g en banc). For the reasons stated in petitioner's opening brief and the reasons set forth below, this Court should reverse the decision below.

A. The Ninth Circuit's Decision Expands Personal Jurisdiction Beyond The Boundaries Of The Due Process Clause.

The Fourteenth Amendment's Due Process Clause "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). This fundamental procedural safeguard "'gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Ibid.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

"Although it has been argued that foreseeability of causing *injury* in another State" should be sufficient for a forum to exercise personal jurisdiction over a nonresident, this Court "has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295). "Instead," this Court has long maintained that "'the foreseeability that is critical to due process analysis . . . is that *the defendant's* conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Ibid.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (alteration in original) (emphasis added). Accordingly, a State may exercise jurisdiction over a defendant who has "purposefully directed" his activities at the forum. *Id.* at 472 (internal quotation marks omitted).

To determine whether a nonresident defendant "purposefully directed" tortious conduct at the forum State, due process requires a plaintiff to allege that the defendant (1) committed an intentional tort; (2) that was expressly aimed at the forum State; and (3) which causes harm the defendant knew would likely be felt in that State. *Calder v. Jones*, 465 U.S. 783, 788-90 (1984). A proper application of *Calder* compels the conclusion that the district court lacked jurisdiction in this case.

The Ninth Circuit's contrary conclusion disregards seminal precedent from this Court and the holdings of at least six circuits,[2] that due process is not satisfied when a defendant aims conduct not at the forum State, but merely at a known forum resident. *See* Pet. App. 84a (O'Scannlain, J., dissenting from denial of reh'g en banc). In complete disregard of that distinction, the panel majority held that, in allegedly preparing a false affidavit in support of forfeiture, petitioner expressly aimed his conduct at Nevada because he "intentionally targeted persons and funds with substantial connections to Nevada." *Id.* at 47a. That is not the type of purposeful direction that this Court has insisted a plaintiff allege be-

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[2] *See Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440 (7th Cir. 2010); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008); *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001) (per curiam); *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 256 (3d Cir. 1998); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 626 (4th Cir. 1997). The First and Sixth Circuits also appear to follow this majority view, although neither Circuit has squarely addressed the issue. *See Noonan v. Winston Co.*, 135 F.3d 85, 90-92 (1st Cir. 1998); *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994).

fore a State legitimately may exercise personal jurisdiction over a nonresident.

By basing personal jurisdiction on a defendant's knowledge of a plaintiff's "significant connection" to a forum and awareness that his actions may impact that forum (Pet. App. 27a), the panel decision effectively ellipsed the second prong of the *Calder* test and revived the "foreseeability" regime flatly rejected by this Court. Pet. App. 91a (McKeown, J., dissenting from denial of reh'g en banc). The result, as the dissenting panel judge recognized, is that "there are no effective limits to the majority's reasoning: all the airport officials who interacted with Fiore and Gipson in Atlanta have potentially subjected themselves to the judicial power of Nevada." *Id.* at 63a (Ikuta, J., dissenting). So too for *every* federal officer who interacts with nonresidents after gaining knowledge of the State or States to which a plaintiff has a "significant connection." Indeed, actions directed at multiple people with connections to different States could result in numerous suits pending in various jurisdictions. This substantial expansion of personal jurisdiction cannot be—and indeed is not—the law. *See id.* at 62a (Ikuta, J., dissenting) ("This case deals the coup de grace to any semblance of compliance with Supreme Court precedent.").[3]

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[3] The Ninth Circuit was also wrong to interpret 28 U.S.C. § 1391(b)(2) as permitting venue in a district in which petitioner never acted, but in which the respondents nevertheless felt the effects of the alleged tort. *Amicus* supports petitioner's arguments on that score, but as explained in Part II *infra*, a ruling on venue alone is insufficient to protect law enforcement officers from defending in faraway States.

B. The Ninth Circuit's Unbounded Theory Of Personal Jurisdiction Will Disproportionately Harm Federal Law Enforcement Officers.

1. As of 2009, federal officials faced upwards of 5,000 *Bivens* claims each year. *See* David Zaring, *Personal Liability as Administrative Law*, 66 Wash. & Lee L. Rev. 313, 322 (2009). Indeed, an attorney in the Department of Justice remarked that, as of 2002, "constitutional tort suits [were] filed against federal employees in every significant law enforcement mission in recent memory, including the seizure of the Branch Davidian compound in Waco, Texas, the stand-off at Ruby Ridge, and now the investigation of terrorist activities in the wake of 9/11." Mary Hampton Mason, *You Mean I Can Be Sued? An Overview of Defending Federal Employees in Individual Capacity Suits*, Civil Issues I, U.S. Attorneys' Bulletin 1, 4 (July 2002). Thousands of other suits arise from officers' daily performance of routine law enforcement responsibilities, such as protecting the United States border, monitoring points of entry, patrolling interstate highways, or guarding government buildings, national parks, and other areas under federal protection.

Regardless of their origin, this Court has long recognized that defending *Bivens* suits exacts significant costs from law enforcement officers, extending far beyond litigation expenses and attorney's fees. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). *Bivens* actions can take "a psychological toll" on the officers whose personal reputations and livelihoods are on the line, causing significant "disrupt[ion to] the lives of [officers] and their families." Mason, *supra* at 2. Even if plaintiffs rarely prevail in *Bivens*

actions, the officer defending her professional reputation and good name may find that, for the duration of the protracted litigation, she is unable to obtain a loan or home mortgage merely because of her status as a defendant to a civil action. *See Federal Tort Claims Act: Hearing on S. 1775 Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. 144 (1982) (written statement of Donald J. Devine, Director, Office of Personnel Management).

The decision below unfairly exacerbates these burdens by requiring officers to defend their actions, reputations, and livelihoods in unpredictable and inconvenient locations. According to the court of appeals, it was "reasonable and comports with traditional notions of fair play" to require petitioner to answer the complaint in Nevada in part because his job "necessitates regularly interjecting himself into affairs of other jurisdictions." Pet App. 32a, 37a. Not so. As a deputized agent of the Drug Enforcement Administration assigned to duty at the Hartsfield-Jackson International Airport in Atlanta, petitioner's only connection to Nevada is *respondents'* purported ties to the State. *See id.* at 27a ("[Petitioner] individually targeted [respondents], as he was aware of their significant connection to Nevada and of the likely impact of his defrauding actions on their property and business in Nevada.").

The court of appeals' focus on the *plaintiffs'* connections to a forum instead of the *defendant's* turns established due process analysis on its head. On the Ninth Circuit's theory, the same intrastate conduct could be the basis for jurisdiction anywhere in the country, based on the fortuity of the "target's" geographical connections. Chance does not provide law enforcement officers any of the required assurances

as to where their conduct will render them liable to suit. *See Burger King*, 471 U.S. at 472.

Moreover, the decision below eliminates any meaningful limits on where law enforcement officers will have to defend damages actions in their personal capacities. *See* Pet. App. 59a (Ikuta, J., dissenting). For example, on the panel majority's reasoning, after checking licenses, a border agent would be subject to suit in the home States of every individual who alleges an intentional tort on the theory that a border-protection agent is "necessarily aware that his actions would often have their principal impact outside of [the State], as many of the people he investigates are [crossing the border] only on their way to somewhere else." Pet. App. 31a. Similarly, an officer providing security at events and sites that attract a nationwide audience, such as the Inauguration, the Washington Monument, or the Super Bowl, could be required to submit to the burdens of litigation in a faraway forum if he knew that his conduct would impact a person in another State. *See id.* at 20a, 24a, 27a. In short, any "disgruntled travele[r]" can force a federal law enforcement officer "to litigate in any traveler's home state." *Id.* at 63a (Ikuta, J., dissenting).

Indeed, the doors to the courthouse may be open in more than just the plaintiff's home State. The court of appeals' test does not require knowledge of *residency* for personal jurisdiction, but only knowledge that a plaintiff has an undefined "significant connection" to a State. Pet. App. 22a-23a ("For the purposes of personal jurisdiction, it does not matter whether [respondents] were legal residents of Nevada or whether they simply had a significant connection to the forum."). Thus, an officer who questions a traveler whose license indicates that he

resides in Oregon, yet who is wearing a Boston College sweatshirt and a Red Sox hat, may be subject to jurisdiction on either coast.

2. The Ninth Circuit diminished the real, concrete costs borne by individual officer defendants, stating that "the traditional weight given to a defendant's inconvenience in having to litigate in a forum in which he has few contacts does not apply in this case" (Pet. App. 37a), given that petitioner received assistance from the Department of Justice, "the world's largest law firm with offices in all fifty states." *Id.* at 33a (internal quotation marks omitted). Constitutional rights, however, are not contingent on the office locations of legal counsel.

Moreover, contrary to the court of appeals' assertion (Pet. App. 32a), representation by the federal government is discretionary; officers cannot count on such aid as a matter of right. Federal regulations authorize government representation for suits brought against officers in their personal capacities only when the officer acted in the scope of employment *and* representation is in the interests of the United States. 28 C.F.R. § 50.15(a)(2). The same is true of an employing agency's decision to indemnify a defendant for any verdict, judgment, or other monetary award rendered against her: Indemnification is not fully guaranteed to an officer at the time a complaint is filed. *See id.* § 50.15(c); *Indemnification of Dep't of Justice Emps.*, 10 Op. O.L.C. 6, 6 (1986) ("The Attorney General *may* use funds from the Department of Justice's general appropriation to indemnify Department employees for actions taken

within the scope of their employment." (emphasis added)).[4]

Even where legal assistance and indemnification are available, federal officers may not know the extent of the indemnification or how far their government counsel will take the case until well into the litigation process. The government determines whether it will provide indemnification only *after* judgment or settlement, 28 C.F.R. § 50.15(c)(3), and (as this case illustrates), government representation does not always extend to all stages of litigation, *see e.g.*, *id.* § 50.15(a)(8)(iv) ("any appeal by Department of Justice attorneys from an adverse ruling or judgment against the employee may only be taken upon the discretionary approval of the Solicitor General").

This Court previously rejected the contention that government reimbursements obviated the need for qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 641 n.3 (1987). "[E]ven assuming that conscientious officials care only about their personal liability and not the liability of the government they serve," this Court stated that one cannot contend that regulations permitting discretionary reimbursement "make reimbursement sufficiently certain and generally available to justify" reconsideration of the principles of qualified immunity. *Ibid.* If anything, doubt about the extent of available indemnification *adds* to the anxiety and uncertainty surrounding litigation.

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[4] Representation is generally not available, or at least is significantly less likely, in cases involving federal criminal proceedings, criminal investigations, cases in which there is a possibility of criminal proceedings, or any civil, congressional, or state proceedings related to an ongoing federal criminal investigation. 28 C.F.R. § 50.15(a)(4)-(7).

3. Additionally, the Ninth Circuit's ruling could diminish the value of the qualified-immunity defense. Because the defense "'is an immunity from suit rather than a mere defense to liability,' [this Court] repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation" to minimize the expense and burden of defense. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (emphasis omitted) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Yet if a defendant were to assert a qualified-immunity defense at the outset without contesting personal jurisdiction, the defendant's objection to personal jurisdiction might be waived. *See* Fed. R. Civ. P. 12(h)(1).

Even if a defendant were initially to contest personal jurisdiction, the Ninth Circuit has stated that a "'plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss.'" Pet. App. 12a (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010)). If the plaintiff makes that showing, "the district court may still order an evidentiary hearing or the matter may be brought up again at trial." *Id.* at 12a n.13 (quoting *Metro. Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n.1 (9th Cir. 1990)). Thus, under the decision below, a plaintiff need only make a minimal "prima facie showing of jurisdictional facts" to force a federal officer to expend the considerable resources necessary to pursue jurisdictional discovery or litigate a qualified-immunity defense in a State to which he may have no connection. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (officials entitled to qualified immunity should not be "subjected to unnecessary and burdensome discovery or trial proceedings").

C. The Ninth Circuit's Unwarranted Expansion Of Personal Jurisdiction Comes At A Substantial Cost Not Only To Individual Officers, But Also To The Public They Serve.

Federal law enforcement officers would not bear the brunt of the Ninth Circuit's ruling alone: Federal agencies, the public fisc, and the citizenry would all bear additional burdens. As recognized by this Court: "[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814 (deciding scope of immunity available to presidential advisors). In addition to the expense of litigation, these societal costs include (1) "distract[ing] . . . officials from their governmental duties," (2) "inhibit[ing] . . . discretionary action," and (3) deter[ring] . . . able people from public service." *Id.* at 816. The court of appeals' unwarranted erosion of due process protections implicates these serious concerns.

Diversion of Public Resources: Exposing government officers to personal liability for alleged constitutional torts "entail[s] substantial social costs." *Creighton*, 483 U.S. at 638. Of those costs, "diversion of official energy from pressing public issues" and "distraction of officials from their government duties," *Harlow*, 457 U.S. at 816, 814, have been held serious enough to warrant shielding officials from liability for some actions altogether. *See, e.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (noting "the time and energy required to defend against a lawsuit" as a concern animating legislative immunity). Although these concerns are present wherever a

complaint is filed, defending suits in unfamiliar forums intensifies these concerns.

Even where the government provides legal representation, the time and resources expended by the Department of Justice are not to be underestimated. It is not the case, as the Ninth Circuit asserted, that a defendant "can be represented just as easily by the United States Attorney's Office in Nevada as by the Office in Georgia." Pet. App. 37a-38a. Filing an action in one State—when the majority of evidence and witnesses are located in another—makes for a more costly and time-consuming defense. The vitality of the Department of Justice is drained by the inefficiencies of mounting an unduly burdensome defense. *Cf.* Statement of Devine, *supra* at 146 ("[T]he time and energy spent by the Executive Branch on the drawn-out judicial proceedings required to separate the few meritorious [*Bivens*] claims from the many frivolous ones cannot be available for the pursuit of other Government interests.").

The increased costs to the Justice Department extend beyond relative expenses and lost time in any given case: The court of appeals' "intentional targeting" test will dramatically increase the number of interactions federal officers have that could subject them to suits in faraway jurisdictions. A plaintiff's ability to force a federal officer to justify his actions in the plaintiff's home State may increase the incentives to sue *at all*, thereby increasing the absolute number of *Bivens* actions and further diminishing fiscal and human resources.

Inhibiting Official Action: Another key rationale for providing predictable protection from "personal monetary liability and harassing litigation" is to ensure that officers are not "unduly inhibit[ed] in the

discharge of their duties." *Creighton*, 483 U.S. at 638. "Federal agents are charged with a responsibility for making sophisticated Constitutional judgments, in the heat of action, about questions which divide lawyers and judges even after they have had the benefit of scholarly arguments and leisurely deliberations." Statement of Devine, *supra* at 141. Uncertainty as to what conduct may result in a lawsuit against an employee personally can "'dampen the ardor of all but the most resolute, or the most irresponsible [federal law enforcement officers], in the unflinching discharge of their duties.'" *Harlow*, 547 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

Under the Ninth Circuit's rule, federal law enforcement officers might think twice during interactions with nonlocals lest they be haled into court thousands of miles away. For any of the myriad decisions federal officers face on a daily basis (on-the-spot decisions such as whether to detain a suspicious party no less than after-the-fact judgments about whether to pursue a prosecution), fear of potential litigation in a distant forum should not stifle the decisive actions necessary to protect our communities and borders.

Deterring Public Service: "As Attorney General Black noted in [1857], it will be difficult to recruit or maintain a superior federal work force if employees are fearful that they may face financial ruin for their actions notwithstanding the fact that they have acted within the scope of their employment." *Indemnification of Dep't of Justice Emps.*, *supra* at 8 (citing 9 Op. Att'y Gen. 51, 52 (1857)). Justice Black echoed this concern in his dissenting opinion in *Bivens*, warning "[t]here is . . . a real danger that such suits might deter officials from the proper and honest per-

formance of their duties." *Bivens*, 403 U.S. at 429 (emphasis omitted).

Recruitment and retention concerns are especially acute for federal law enforcement officers, who may decide that the ever-present risk of bodily injury and increasing threat of personal liability outweigh the benefits of public service. The added costs and inconveniences of litigating more frequently in far-off jurisdictions will only make it harder to attract and retain exceptional citizens in vital, public safety positions—a burden that "'society as a whole'" will be required to bear. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) (quoting *Harlow*, 457 U.S. at 814)). Indeed, after this case, the Drug Enforcement Administration could well find a shortage of state officers willing to serve as deputized agents in our nation's airports.

II. A Ruling On Venue Is Insufficient To Protect Law Enforcement Officers.

The Ninth Circuit ruled, incorrectly, that Nevada could exercise personal jurisdiction over petitioner and that venue was proper in the District of Nevada. Although reversal on either ground would protect petitioner here, only a decision on personal jurisdiction would provide full protection for law enforcement officers moving forward.

The Ninth Circuit erroneously held that Nevada was an appropriate venue under the general venue statute, 28 U.S.C. § 1391(b), which as relevant here permits suits against private persons in the judicial district (1) "in which any defendant resides, if all defendants are residents of the State in which the district is located"; (2) where "a substantial part of the events or omissions giving rise to the claim oc-

curred"; or (3) if no permissible district exists under the previous subsections, where any defendant is subject to the court's personal jurisdiction. According to the Ninth Circuit, the District of Nevada was an appropriate venue under the "events or omissions" prong of Section 1391(b) because respondents "suffered harm in Nevada." Pet. App. 41a.

The court of appeals' focus on the location of the plaintiff's injury is at odds with this Court's admonition that Congress could not have intended to subject individual officers to suit in every district in the country. For a suit against an officer in his *official* capacity, venue may lie in the district in which the plaintiff resides. 28 U.S.C. § 1391(e)(1)(C). In *Stafford v. Briggs*, 444 U.S. 527 (1980), however, this Court clarified that Section 1391(e)(1)(C) is inapplicable to suits against federal officers *individually*. *Id.* at 542, 544. There is "no indication," this Court stated, "that a Congress concerned with the sound and equitable administration of justice intended to impose on those serving the Government the burden of defending personal damages actions in a variety of distant districts." *Id.* at 545 (internal citations and quotation marks omitted). Significantly, Congress did not make the plaintiff's residence an appropriate venue in all civil actions. *See* 28 U.S.C. § 1391(b).

By equating the location in which the plaintiff suffers injury with the location in which the events giving rise to the cause of action occurred, the Ninth Circuit did violence to the statutory text and eviscerated the greater protections Congress intended for officers sued in their personal, rather than official, capacities. *See Stafford*, 444 U.S. at 544-45. Such a result runs directly contrary to this Court's affirmation that "the purpose of statutorily specified venue is to protect the *defendant* against the risk that a

plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-84 (1979).

Although correcting the Ninth Circuit's erroneous construction of Section 1391(b)(2) would provide some relief, that alone would not avert the harm of the Ninth Circuit's personal jurisdiction ruling. Section 1391 governs venue in civil actions brought in federal district court, but a separate provision, Section 1441(a), governs venue in removed actions. 28 U.S.C. § 1441(a); *see also Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953). For removed actions, Section 1441(a) "expressly provides" that venue lies in "'the district court of the United States for the district and division embracing the place where such an action is pending.'" *Polizzi*, 345 U.S. at 666 (quoting 28 U.S.C. § 1441).

As a result of disparate venue rules for original and removed actions, *Bivens* plaintiffs in the Ninth Circuit could circumvent the venue provisions of Section 1391(b) by filing their claims in state court. If the defendant chooses to remove the case to federal court, venue would lie in the district where the state case was filed—even if venue would not have been proper in that district had the plaintiff brought suit in federal court. Limitations on personal jurisdiction normally provide a check on this type of gamesmanship, but not if this Court were to leave unchecked the Ninth Circuit's unrestrained theory of personal jurisdiction.[5]

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[5] Although a defendant could seek a transfer under 28 U.S.C. § 1404, the *forum non conveniens* statute, a mechanism for discretionary transfer is not an adequate substitute for the constitutional right not to be haled into court in distant jurisdictions.

Additionally, a holding limited to venue would cause significant disparity in the locations in which defendants are subject to suit. While plaintiffs who have a "significant connection" to any of the nine States covered by the Ninth Circuit's incorrect reading of *Calder*'s "express aiming" requirement could potentially circumvent an objection to venue under Section 1391(b) by filing in state court, that same option would not be available to plaintiffs in the other forty-one States who remain properly constrained by the due process limits of personal jurisdiction.[6] Thus, a holding limited to venue would create opportunities for plaintiffs to evade Section 1391(b) and this Court's decision based on the fortuity of the States in which those plaintiffs reside.

* * *

The Ninth Circuit was wrong on both venue and personal jurisdiction, and this Court should reverse both errors. Federal law enforcement officers—like the citizens they safeguard—are entitled to the protections of the Due Process Clause, without regard to the plaintiff's connections to another jurisdiction or the identity or office locations of their legal counsel. Only a ruling on personal jurisdiction would both provide a rule with uniform application, and effectively protect federal officers from the fundamentally

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[6] Additionally, plaintiffs in the Eleventh Circuit might not be appropriately restrained by personal jurisdiction. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1287 (11th Cir. 2008) (holding that court may exercise personal jurisdiction over defendant who allegedly made unauthorized use of a plaintiff's trademark "calculated to cause injury in the forum State"). Thus, plaintiffs in any of the three States within that Circuit might also evade a venue ruling.

unfair burdens of defending in inconvenient forums without fair warning.

There is nothing just about subjecting federal officers, who devote their careers and risk their lives on behalf of the citizenry, to suit in distant States because they interact frequently with nonlocals in our nation's borders, tourist sites, and transportation hubs. Reversal is appropriate to disapprove the Ninth Circuit's ill-conceived attempt to subject officers to suit in jurisdictions with which they have little, if any, ties, and to affirm once again that the Due Process Clause mandates that a court may not impose the significant costs of litigating in faraway forums—whether defendants bear them alone or share them with an indemnifying party—unless defendants expressly aim their conduct at the forum State.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. PERSONAL JURISDICTION CANNOT LIE AGAINST AN OUT-OF-STATE DEFENDANT SUED FOR INTENTIONAL TORTS UNLESS HE EXPRESSLY AIMED HIS EXTRA-TERRITORIAL CONDUCT AT THE FORUM STATE AND THEREBY INTENDED TO CAUSE HARM SPECIFICALLY AND PRIMARILY IN THAT STATE. 7

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Asahi Metal Indus. Co. v. Superior Court,
480 U.S. 102 (1987) 9

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) ..... *passim*

Calder v. Jones,
465 U.S. 783 (1984) ..... *passim*

Fiore v. Walden,
688 F.3d 558 (9th Cir. 2012) 8, 12, 14, 15

Int'l Shoe Co. v. Washington,
326 U.S. 310 (1945) 9

J. McIntyre Mach., Ltd. v. Nicastro,
131 S. Ct. 2780 (2011) 12

Shaffer v. Heitner,
433 U.S. 186 (1977) 9

U.S. v. Morton,
467 U.S. 822 (1984) 10

United States v. One Assortment of 89 Firearms,
465 U.S. 354 (1984) 13

United States v. Ursery,
518 U.S. 267 (1996) 13

OTHER AUTHORITIES

U.S. Const. amend. XIV, § 1 7

Fed. R. Civ. P. 4(k)(1)(A) 7

Fed. R. Civ. P. 4(k)(1)(C) 7

INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF"), and Associated Industries of Massachusetts ("AIM"), seek to present their views, and the views of their supporters, on the issue presented in this case, namely whether the Due Process Clause permits a court to assert personal jurisdiction over an out-of-State defendant merely because he knew of the plaintiff's connections with the forum State.[1] Otherwise put, at issue is whether personal jurisdiction can lie when it is merely foreseeable that the plaintiff may feel the effects of the defendant's extra-territorial actions in the forum State.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters

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[1] Pursuant to Supreme Court Rule 37.6, NELF and AIM state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), NELF and AIM state that, on March 7 and on March 12, 2013, counsel for the petitioner and counsel for the respondents filed respectively a general written consent with this Court to the filing of amicus briefs, in support of either or neither party.

include both large and small businesses located primarily in the New England region.

AIM is a 97-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

NELF and AIM are committed to the importance and preservation of the due process protections afforded businesses when they are sued in unanticipated, remote, and inconvenient fora. In this connection, NELF recently filed an amicus brief on behalf of the business defendant in *DaimlerChrysler AG v. Bauman*, *cert. granted*, 2013 WL 1704716 (U.S. Apr. 22, 2013) (No. 11-965), arguing for reasonable due process limits on a court's exercise of general jurisdiction over a foreign corporation. Moreover, NELF has filed many other amicus briefs before this Court, advocating for important protections afforded businesses under the Constitution and federal law. *See, e.g., Spirit Airlines, Inc. v. Dep't of Transp.*, *cert. denied*, 133 S. Ct. 1723 (Apr. 1, 2013) (No. 12-656) (First Amendment protection of airline price advertising); *Univ. of Texas Sw. Med. Ctr. v. Nassar, cert. granted*, 133 S. Ct. 978 (Jan 18, 2013) (No. 12-484) (standard of causation in Title VII retaliation claims); *Oxford Health Plans LLC v. Sutter*, *cert. granted,* 133 S. Ct. 786 (December 07, 2012) (No. 12-135) (contractual basis for imposing class arbitration under Federal Arbitration Act); *Am. Express. Co. v. Italian Colors*

Restaurant, cert. granted, 133 S. Ct. 594 (Nov. 9, 2012) (No. 12–133) (enforcement under FAA of class action waivers in arbitration of federal statutory claims); AT&*T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preemption of state law requiring class arbitration); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (First Amendment protection of sale and use of prescriber-identifiable data).

In this case, NELF and AIM oppose the exercise of personal jurisdiction over an out-of-state defendant who has not established the minimum contacts with the forum State that due process requires to provide him with fair warning that he may sued in that State. As this Court has held, where, as here, the defendant has not expressly aimed his extra-territorial conduct at the forum State, nor made it the focal point of his actions, he has not established minimum contacts with that State, and personal jurisdiction cannot lie. *See Calder v. Jones*, 465 U.S. 783 (1984) (specific jurisdiction lay over Florida journalist and editor who "expressly aimed" defamatory article at California and made that State "the focal point" of tort).

In this case, however, the Ninth Circuit has impermissibly conflated the rigorous "expressly aimed" requirement under *Calder v. Jones* with a mere foreseeability-of-effects standard, which this Court has rejected as insufficient to ground personal jurisdiction. If allowed to stand, the Ninth Circuit's decision would effectively eliminate the minimum contacts requirement of the Due Process Clause by basing personal jurisdiction erroneously on the *plaintiff*'s forum connections, rather than the

defendant's own purposeful contacts with that State. Such a misguided approach would expose NELF's and AIM's business constituents impermissibly to the risk of personal jurisdiction in unanticipated and remote fora whenever they are sued for such common business torts as fraud, breach of fiduciary duty, misappropriation of trade secrets, unfair competition, or tortious interference with business relations. In left uncorrected, the Ninth Circuit's decision will have effectively deprived the alleged intentional tortfeasor of the notice and fairness protections guaranteed under the Due Process Clause.

For these and other reasons discussed below, NELF and AIM believe that their brief would provide an additional perspective to aid this Court in deciding the issues presented in this case.

SUMMARY OF ARGUMENT

Due process does not permit a court to assert personal jurisdiction over an out-of-state defendant solely because he knew that the plaintiff had connections to the forum State. A defendant's mere knowledge of the plaintiff's connections with the forum State cannot establish the direct and purposeful contacts between the *defendant* and the forum State that due process requires. The essential purpose of the minimum contacts requirement here is to provide the defendant with fair warning as to where he may be sued for claims arising from those contacts. It is inconceivable how the mere knowledge of a plaintiff's connections to the forum State could provide the defendant with sufficient notice that he may be sued there.

The Ninth Circuit has also misinterpreted *Calder v. Jones*, 465 U.S. 783 (1984), in which this Court specified the minimum contacts necessary to assert personal jurisdiction over a defendant sued for intentional torts. Such a defendant must have "expressly aimed" his extra-territorial conduct at the forum State and made it the "focal point" of his actions to establish minimum contacts there. That is, the alleged intentional tortfeasor must have targeted his conduct both at the plaintiff and *at the forum State*, and not merely at a plaintiff with known forum connections. The forum State must be the *intended* locus and center of the harm, and not merely a foreseeable place where the plaintiff might feel some of the effects of the defendant's actions, as in this case. Therefore, a defendant has "expressly aimed" his tortious conduct at the forum State only when he has intended to cause harm to the plaintiff specifically and primarily in that State. Only the defendant who has acted with such a specific intent could reasonably anticipate being haled into a court of the forum State to defend his actions there.

By contrast, in this case there is no such deliberate targeting of the forum State, and therefore no specific intent to cause harm primarily in that State. The Ninth Circuit has erroneously imposed personal jurisdiction based solely on the petitioner's knowledge of the respondents' forum contacts, as if personal jurisdiction could be established vicariously. This Court has rejected any such personal jurisdiction "by association" under the Due Process Clause.

In particular, the Ninth Circuit has conflated the rigorous "express aiming" requirement under *Calder v. Jones* with a mere foreseeability-of-effects standard, which the Court expressly rejected in that case, and in other decisions, as insufficient to establish personal jurisdiction. The lower court apparently concluded that, since the petitioner allegedly knew about respondents' forum connections when he prepared an allegedly false and misleading affidavit to support the potential forfeiture of respondents' money in Georgia, then he must have known that respondents would feel the financial consequences of any resulting delay in the return of their money in the forum State of Nevada. According to the Ninth Circuit, this knowledge alone satisfies the "express aiming" requirement.

But the Ninth Circuit has in fact concluded that it was merely *foreseeable* to the petitioner that respondents would feel the effects of his affidavit in the forum State. The Ninth Circuit has thus apparently misunderstood that, under *Calder v. Jones*, the defendant must deliberately target the forum State and make it the intended focal point of his actions and their consequences. Mere knowledge of a plaintiff's connections with the forum State is not proof of a defendant's specific intent to cause harm primarily in that State. If allowed to stand, then, the Ninth Circuit's decision would reduce the minimum contacts requirement under *Calder v. Jones* to a constitutionally inadequate foreseeability-of-effects standard, which misdirects the jurisdictional inquiry from the *defendant's* relationship with the forum State to the plaintiff's independent relationship with that State.

ARGUMENT

I. PERSONAL JURISDICTION CANNOT LIE AGAINST AN OUT-OF-STATE DEFENDANT SUED FOR INTENTIONAL TORTS UNLESS HE EXPRESSLY AIMED HIS EXTRA-TERRITORIAL CONDUCT AT THE FORUM STATE AND THEREBY INTENDED TO CAUSE HARM SPECIFICALLY AND PRIMARILY IN THAT STATE.

At issue in this case is whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a court to assert personal jurisdiction over an out-of-state defendant who is sued for extra-territorial conduct, solely because the defendant directed his conduct at an individual with known connections to the forum State.[2] The Ninth Circuit in this case so held,

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[2] The Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. While this case concerns the constitutional limits on a federal court's exercise of personal jurisdiction, it is the Due Process Clause of the Fourteenth Amendment, and not the Fifth Amendment, that applies here. This is so because, absent a federal statute to the contrary, a federal district court may only exercise personal jurisdiction to the same extent as a State court of general jurisdiction in the State where the district court sits. *See* Fed. R. Civ. P. 4(k)(1)(A), (C). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985) ("The question presented is whether this exercise of long-arm jurisdiction [by a federal district court] offended traditional conceptions of fair play and substantial justice embodied in the

concluding that a nonresident defendant's mere knowledge of a plaintiff's forum connections establishes the necessary minimum contacts between the defendant and the forum State to satisfy due process.

In particular, the lower court subjected petitioner, Anthony Walden, a Drug Enforcement Administration ("DEA") agent on duty at the Atlanta, Georgia airport, to personal jurisdiction in Nevada for a *Bivens* action arising from his confiscation, in Atlanta, of approximately $97,000 belonging to respondents, Gina Fiore and Keith Gipson. *Fiore v. Walden*, 688 F.3d 558, 570-71 (9th Cir. 2012). Respondents are professional gamblers who were passing through the Atlanta airport, en route from Puerto Rico to Las Vegas. *Id.* Walden confiscated their money because he believed that it may have been involved in an unlawful drug transaction. *Id.*, 688 F. 3d at 571. Petitioner's actions were confined to the State of Georgia and were directed solely at the seizure and forfeiture of respondents' money in that State.[3]

Due Process Clause of the Fourteenth Amendment.") (citation and internal quotation marks omitted).

[3] In particular, respondents allege that petitioner wrongfully seized their money in the Atlanta airport, and then provided a false and misleading probable cause affidavit to the United States Attorney in the Northern District of Georgia, in support of the potential forfeiture of respondents' money. *Fiore v. Walden*, 688 F. 3d at 571-72. Respondents do not allege that petitioner knew about their Nevada connections when he seized their money. *Id.*, 688 F. 3d at 577-78. Instead, Walden allegedly became aware of their Las Vegas ties only when he prepared the affidavit. *Id.* at 578.

The Ninth Circuit has erred in asserting personal jurisdiction over the defendant in this case. Under this Court's clear precedent, an out-of-state defendant's mere knowledge of the plaintiff's connections with the forum State cannot establish the direct and purposeful contacts between the *defendant* and the forum State that due process requires. Indeed, it is inconceivable how the mere knowledge of a plaintiff's connections to the forum State could provide the defendant with sufficient notice that he may be sued there, consistent with "traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted). After all, "[t]he constitutional touchstone [under the Due Process Clause] . . . remains whether the defendant *purposefully established* minimum contacts in the forum State." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108-09 (1987) (citations and internal quotations omitted) (emphasis added). *See also Shaffer v. Heitner,* 433 U.S. 186, 204 (1977) (minimum contacts requirement "focuses on the relationship among the *defendant*, the forum, and the litigation . . .") (emphasis added).

In cases of specific jurisdiction, such as this one, the essential purpose of the minimum contacts requirement is to provide the defendant with sufficient notice as to where he may be sued for claims arising from those contacts. "[T]he defendant's conduct and connection with the forum State are such that he should *reasonably anticipate* being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (citation and internal quotation marks omitted) (emphasis added). Due process therefore protects a defendant's

reasonable expectations "[b]y requiring that individuals have *fair warning* that a particular activity may subject them to the jurisdiction of a foreign sovereign . . . ." *Burger King*, 471 U.S. at 472 (citation and internal quotation marks omitted) (emphasis added).

To serve this essential notice function under the Due Process Clause, the minimum contacts requirement focuses, by necessity, on the *defendant*'s purposeful contacts with the forum State, contrary to the Ninth Circuit's approach in this case. "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no *meaningful contacts, ties, or relations*." *Burger King*, 471 at 471-72 (citation and internal quotation marks omitted) (emphasis added). Only a defendant who has established such meaningful contacts with the forum State could reasonably expect to be sued in that State for claims arising from those contacts. In short, due process protects a defendant from being haled into an unanticipated and remote forum. *See U.S. v. Morton*, 467 U.S. 822, 828 (1984) ("[P]ersonal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum."). The Ninth Circuit has apparently lost sight of this basic purpose of the Due Process Clause.

The Ninth Circuit has also misinterpreted this Court's key precedent addressing the due process protections afforded the out-of-state defendant who is sued for intentional torts, such as the petitioner in this case. Such a defendant must have "expressly aimed" his extra-territorial conduct at the forum State and made it the "focal point" of his actions to

establish minimum contacts there. *Calder v. Jones*, 465 U.S. 783, 789 (1984) (specific jurisdiction lay over Florida journalist and editor who "expressly aimed" defamatory article at California by describing Hollywood entertainer's alleged drinking and unprofessionalism within her industry, thereby making California "the focal point" of tort).

As *Calder v. Jones* illustrates, the alleged intentional tortfeasor must have targeted his conduct both at the plaintiff and *at the forum State*, and not merely at a plaintiff with known forum connections. Under *Calder v. Jones*, the forum State must be the *intended* locus and center of the harm, and not merely a foreseeable place where the plaintiff might feel some of the effects of the defendant's actions, as in this case. *See id.*, 465 U.S. at 789.

In fact, this Court made it especially clear in *Calder v. Jones* that the "express aiming" requirement is definitionally distinct from a mere foreseeability-of-effects standard. In that case, the Court addressed the petitioners' argument that "[t]he mere fact that they can 'foresee' that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction." *Calder v. Jones*, 465 U.S. at 789. The Court flatly rejected the petitioners' characterization of the minimum contacts requirement as constituting a mere foreseeability standard. "[P]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were *expressly aimed at* California." *Id.* (emphasis added). That is, the petitioners' actions in *Calder v. Jones*, unlike the petitioner's conduct in this case, showed that they *intended* to

cause harm in the forum State, thereby exposing themselves to personal jurisdiction in that state to defend their actions there.

Therefore, a defendant has "expressly aimed" his tortious conduct at the forum State under *Calder v. Jones* only when he has intended to cause harm to the plaintiff specifically and primarily in that State. In effect, *Calder v. Jones* creates an additional jurisdictional element of proof to the underlying intentional tort. To establish personal jurisdiction over the out-of-state defendant, the plaintiff must show that the defendant deliberately targeted his conduct at the forum State and, in so doing, had the specific intent to harm the plaintiff in that State. Only the defendant who has acted with such an intent could reasonably anticipate being haled into a court of the forum State to defend his actions there. Such a tortfeasor has effectively implicated the sovereign authority of the forum State itself and is therefore on notice that he may be sued there. *C.f. J. McIntyre Mach., Ltd. v. Nicastro,* 131 S. Ct. 2780, 2787 (2011) ("[I]n some cases, as with an *intentional tort*, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws.") (emphasis added).

By contrast, in this case there is no such deliberate targeting of the forum State, and therefore no specific intent to cause harm primarily in that State. The petitioner seized respondents' money in Georgia and then prepared, in Georgia, an allegedly false and misleading affidavit to support the potential forfeiture of respondents' money in Georgia. *See Fiore v. Walden*, 688 F. 3d at 577-78. That is, the petitioner aimed his conduct expressly and exclusively at the State of Georgia and not at

the forum State of Nevada.[4] Accordingly, the petitioner has not, by his conduct, established the minimum contacts with the forum State, if any contacts at all, that Due Process requires to put him on notice that he could be sued there.

And yet, despite the clear lack of minimum contacts, and despite this Court's repeated emphasis on the bedrock notice and fairness principles inhering in the Due Process Clause, the Ninth Circuit has nonetheless asserted personal jurisdiction against the out-of-state defendant in this case. The lower court has imposed personal jurisdiction based solely on the petitioner's knowledge of the respondents' forum contacts, as if personal jurisdiction could be established vicariously. However, this Court has clearly rejected any such notion of personal jurisdiction "by association" under the Due Process Clause. "The unilateral [forum] activity of those [plaintiffs] who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Burger King*, 471 U.S. at 474 (citation and internal quotation marks omitted).

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[4] Moreover, forfeiture proceedings are typically actions *in rem*, because they target the property itself, and not the property's owner. Therefore, the petitioner could reasonably anticipate being sued in the jurisdiction where he seized respondents' property, and not where respondents were living at the time. "Congress specifically structured these forfeitures to be impersonal by *targeting the property itself*, . . . 'with jurisdiction dependent upon *seizure of a physical object*.'" *United States v. Ursery*, 518 U.S. 267, 289 (1996) (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363) (1984) (emphasis added)).

In particular, the Ninth Circuit has based its decision solely on the fact that the petitioner allegedly knew about respondents' Nevada connections when he filed an allegedly false and misleading probable cause affidavit, in Georgia, to support the potential forfeiture of respondents' money that he had seized in Georgia. *See Fiore v. Walden*, 688 F. 3d at 577-78. The lower court apparently concluded that, since the petitioner allegedly knew about respondents' forum connections when he prepared the affidavit, then he must have known that respondents would feel the financial consequences of any resulting delay in the return of their money in the forum State. *See id.*, 688 F. 3d at 578-79, 580-81. According to the Ninth Circuit, this knowledge alone satisfies the "expressly aimed" requirement under *Calder v. Jones*. *Id.*, 688 F. 3d at 581.

But the Ninth Circuit has merely concluded that the defendant could reasonably *foresee* that respondents would feel the effects of his actions in the forum State. And this Court in *Calder v. Jones* clearly rejected the sufficiency of a mere foreseeability-of-effects standard under the Due Process Clause, as discussed above. *See id.*, 465 U.S. at 789. In a subsequent case, the Court elaborated on the inadequacy of a mere foreseeability-of-effects standard under the Due Process Clause:

> Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such [minimum] contacts there when policy considerations so require, the Court has consistently held that *this kind of foreseeability is*

> *not a sufficient benchmark for exercising personal jurisdiction*. . . . Instead, the foreseeability that is critical to due process analysis is that the *defendant's conduct and connection with the forum State* are such that he should reasonably anticipate being haled into court there.

Burger King, 471 U.S. at 474 (citation and internal quotation marks omitted) (second and third emphases added).

The Ninth Circuit has therefore conflated the rigorous "expressly aimed" requirement under *Calder v. Jones* with a mere foreseeability-of-effects standard, even though the lower court observed correctly "that the express aiming requirement is not satisfied where it is merely foreseeable that there will be an impact on individuals in the forum." *Fiore v. Walden*, 688 F. 3d at 577. Despite this accurate statement of the law, however, the Ninth Circuit has erred in *applying* the law to the allegations in this case. The Ninth Circuit has apparently misunderstood that, under *Calder v. Jones*, the defendant must deliberately target the forum State and make it the intended focal point of his actions and their consequences. *See id.*, 465 U.S. at 789. Mere knowledge of a plaintiff's connections with the forum State is not enough to establish personal jurisdiction because it is not proof of a defendant's specific intent to cause harm primarily in that State.

If allowed to stand, then, the Ninth Circuit's decision would reduce the minimum contacts requirement under *Calder v. Jones* to a

constitutionally inadequate foreseeability-of-effects standard. The lower court's approach misdirects the jurisdictional inquiry from its proper focus--the defendant's purposeful contacts with the forum State--to the plaintiff's contacts there. In so doing, the lower court has effectively eliminated the minimum contacts requirement applicable to the out-of-state defendant sued for intentional torts. As a result, the lower court has deprived the out-of-state defendant of the notice and fairness protections afforded him under the Due Process Clause. Personal jurisdiction cannot lie under those circumstances, and the Ninth Circuit's decision should therefore be reversed.

CONCLUSION

For the reasons stated above, NELF and AIM respectfully request that this Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

AUG 2 - 2013

No. 12-574

IN THE

Supreme Court of the United States

ANTHONY WALDEN,

Petitioner,

v.

GINA FIORE AND KEITH GIPSON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* WORKERS' INJURY LAW & ADVOCACY GROUP IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. A STATE MAY CONSTITUTIONALLY EXERCISE PERSONAL JURISDICTION OVER AN OUT-OF-STATE DEFENDANT WHEN THE UNLAWFUL CONDUCT OCCURS OUTSIDE THE STATE, BUT THE DEFENDANT KNOWS OR SHOULD REASONABLY KNOW, THAT THE VICTIM IS A RESIDENT OF THE FORUM STATE AND WILL SUFFER HARM THERE	5
A. Nevada's Long-Arm Statute Permits Personal Jurisdiction	5
B. The Ninth Circuit Correctly Held that Defendant Purposefully Directed Conduct at the Forum State	6
II. VENUE UNDER 28 U.S.C. § 1391(B)(2) IS PROPER IN NEVADA BECAUSE A SUBSTANTIAL PORTION OF THE EVENTS GIVING RISE TO THE CLAIM OCCURRED IN NEVADA	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
Acquadro v. Bergeron, 851 So. 2d 665 (Fla. 2003)	9
American Dredging Co. v. Miller, 510 U.S. 443 (1994)	12
Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., 480 U.S. 102 (1987)	6
Brennan v. Roman Catholic Diocese of Syracuse N.Y., Inc., 322 Fed. Appx. 852 (11th Cir. Fla. 2009)	8
Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)	7
Calder v. Jones, 465 U.S. 783 (1984)	7, 8, 9
Certain-Teed Prods. v. District Court, 87 Nev. 18, 479 P.2d 781 (1971)	5
Cold Spring Harbor Lab. v. Ropes & Gray LLP, 762 F. Supp. 2d 543 (E.D.N.Y. 2011)	11
Doe v. Mitchell, 2009 U.S. Dist. LEXIS 29928 (D. Nev. Mar. 26, 2009)	11
Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)	11
Hanson v. Denckla, 357 U.S. 235 (1958)	6, 7
Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A., 421 F.3d 1162 (11th Cir. Fla. 2005)	8
IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254 (1998)	9

TABLE OF AUTHORITIES—Continued

	Page
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	6
Judas Priest v. Second Judicial Dist. Court, 104 Nev. 424, 760 P.2d 137 (Nev. 1988)	5
Licciardello v. Lovelady, 544 F.3d 1280 (11th Cir. 2008)	8
Moneygram Payment Sys., Inc. v. Consorcio Oriental, S.A., 65 Fed. Appx. 844 (3d Cir. 2003)	6
Scheidt v. Klein, 956 F.2d 963 (10th Cir. 1992)	11
Shaffer v. Heitner, 433 U.S. 186 (1977)	6
Sierra Club v. Johnson, 623 F. Supp. 2d 31 (D.D.C. 2009)	11
Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973)	11
Tyson v. Pitney Bowes Long-Term Disability Plan, 2007 U.S. Dist. LEXIS 90842, 2007 WL 4365332 (D.N.J. Dec. 11, 2007)	11
U.S.O. Corp. v. Mizuho Holding Company, et al., 547 F.3d 749 (7th Cir. 2008)	12
Waste Mgmt., Inc. v. Admiral Ins. Co., 138 N.J. 106, 649 A.2d 379 (N.J. 1994)	7
STATUTES	
28 U.S.C. § 1391(b)(2)	4, 10, 11
Fla. Stat. § 48.193(1)(b)	9
Nev. Rev. Stat. 14.065(1)	5

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

Page

A. Widman, *Workers' Compensation: A Cautionary Tale*, p. 3 (2006)..... 1

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Workers' Injury Law & Advocacy Group [WILG] is an organization dedicated to protecting and advocating the rights of injured workers throughout the United States. WILG has substantial common interests in ensuring that the rights of injured employees are not diminished further by their inability to bring a suit against a foreign defendant in the jurisdiction where the injury occurs and/or where the injured employee resides. When a foreign defendant's purposeful acts cause economic injuries in the forum state, then that foreign defendant must be subject to the jurisdiction of the court in the forum state, whether in tort or under the workers' compensation system in a particular state.

"Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help. Once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics, and influence-peddling. This happens either through aggressive industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts. All have happened to workers' compensation." A. Widman, *Workers' Compensation: A Cautionary Tale*, p. 3 (2006). To further

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

limit the rights of any party to the forum of a foreign defendant, could have a far reaching effect upon the workers' compensation programs across the country and on the rights of injured employees. The narrow application of personal jurisdiction in an intentional tort action in a foreign jurisdiction could be expanded to preclude coverage when a work accident occurs in a foreign jurisdiction.

In this case, the Supreme Court's resolution will have a direct impact on the ability of future victims to obtain access to justice in their forum state, including employees injured by intentional torts. In our mobile society, employees are relocated to perform work in foreign jurisdictions on a regular basis, the most significant of which are interstate truck drivers, employees on oil rigs, and construction employees. Employees must travel through airline hubs, be subjected to TSA agents, DEA agents, immigration agents, and other federal and state agents, and run the risk of injury due to intentional or negligent torts of others during travel through airline hubs. The rights of injured employees continue to legislatively diminish in the workers' compensation arena. Preserving the rights of injured employees requires vigilant protection. Constitutional challenges to the *quid pro quo* are mounting at the state level with the politicized and legislated reduction in workers' compensation benefits and/or deforms in the workers' compensation system occurring since 1990. Thus, the subtraction of even more normally available and previously contemplated tort claims is unconscionable – this is exactly what will occur if jurisdiction is denied. The right to sue is a cherished right, and further it is an inalienable right. Dramatically narrowing the "minimum contacts" analysis that forum courts routinely apply to determine if personal jurisdiction may be exercised

over foreign defendants will deny justice to these victims.

SUMMARY OF ARGUMENT

Nevada's long-arm statute is interpreted to reach the limits of federal constitutional due process, thus, absent a due process violation, personal jurisdiction exists. Nevada's long-arm statute is liberally construed to reach the outer limits of federal constitutional due process. The Ninth Circuit properly concluded that Nevada has personal jurisdiction over Petitioner, and that venue is proper in the district of Nevada. If a forum state is prohibited from exercising personal jurisdiction over a foreign defendant when the unlawful conduct occurs outside the forum state, but the defendant knows or should reasonably know that the victim is a resident of the forum state and will suffer harm there, it is a short step to preclude injured employees who are truck drivers, or construction employees, or oil rig employees who perform work outside the state where they live, or where the contract of employment occurred, from bringing a workers' compensation action in their forum state. Similarly, employees regularly must fly through airline hubs, and are subjected to circumstances or acts involving TSA agents, DEA agents, immigration agents, and/or other federal or state agents, which may result in tortious conduct or intentional injury. There is no ability to avoid such encounters when traveling. Therefore, on these facts, to limit the ability to bring a cause of action against the foreign defendant in the forum state, would be at odds with this Court's longstanding precedents, and would force victims of intentional torts to litigate in the defendant's home forum. This option is not only costly but it would also

chill the right to justice and deter the victim's access to the court.

Furthermore, to limit venue under 28 U.S.C. § 1391(b)(2) to judicial districts in which the defendant's allegedly unlawful acts or omissions occur would severely limit personal jurisdiction and close our courts to many victims passing through airports, without an expectation that flying through hubs limits their access to justice if a TSA agent, DEA agent, immigration agent, and/or other federal or state agent at the airport allegedly commit unlawful acts or omissions. A narrow and restrictive construction of 28 U.S.C. § 1391(b)(2), would impose a substantial and unfair burden on a victim's right to a convenient judicial forum for redress of his or her injuries. If this Court precludes a state from exercising personal jurisdiction over an out-of-state defendant when the unlawful conduct occurs outside the state, but the defendant knows or should reasonably know that the victim is a resident of the forum state and will suffer harm there, the ramifications of such a decision will reach far beyond the case at bar, and permeate jurisdictional issues in state workers' compensation claims, in personal injury claims, in class actions, and in federal tort claims. Only tort claims provide a full and possibly fair recovery of the type forfeited by injured employees when the *quid pro quo* establishing workers' compensation systems were originally established. Furthermore, with the *quid pro quo* bargain between the employees and the employers questioned due to the continuous legislative reduction in workers' compensation benefits, the natural progression of commerce cannot be allowed to further deteriorate the rights of the injured employees. Furthermore, the employers, insurance companies, and ultimately the consumers, will be excessively burdened when they

must bear the cost of the inability of victims to sue foreign defendants in the local forum and, thereby, must absorb the total loss to the United States work force incurred as a result of the tortious act. Additionally, foreign defendants should be liable for injuries due to their allegedly unlawful acts or omissions either where the acts occurred, so long as the purposeful conduct creates a substantial connection with the victim's forum state.

ARGUMENT

I. A STATE MAY CONSTITUTIONALLY EXERCISE PERSONAL JURISDICTION OVER AN OUT-OF-STATE DEFENDANT WHEN THE UNLAWFUL CONDUCT OCCURS OUTSIDE THE STATE, BUT THE DEFENDANT KNOWS THAT THE VICTIM IS A RESIDENT OF THE FORUM STATE AND WILL SUFFER HARM THERE

A. Nevada's Long-Arm Statute Permits Personal Jurisdiction

Nevada's long-arm statute provides that: "A court of this state may exercise jurisdiction over a party to a civil action on any basis not inconsistent with the constitution of this state or the Constitution of the United States." Nev. Rev. Stat. 14.065(1). Nevada's long-arm statute is interpreted to reach the limits of federal constitutional due process, thus, absent a due process violation, personal jurisdiction exists. *Judas Priest v. Second Judicial Dist. Court,* 104 Nev. 424, 760 P.2d 137, 138 (Nev. 1988). Nevada's long-arm statute is liberally construed to reach the outer limits of federal constitutional due process. *Certain-Teed Prods. v. District Court*, 87 Nev. 18, 479 P.2d 781 (1971). In this case, the due process analysis centers

on whether Walden has "minimum contacts" with Nevada, such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

B. The Ninth Circuit Correctly Held that Defendant Purposefully Directed Conduct at the Forum State

The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). Minimum contacts exist when there is "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 109 (1987). A defendant's contacts with the forum state must be assessed individually. *Moneygram Payment Sys., Inc. v. Consorcio Oriental, S.A.*, 65 Fed. Appx. 844, 850 (3d Cir. 2003). The reasonableness of subjecting a nonresident defendant to the courts of a given forum depend upon the "quality and nature of the defendant's activity" in the forum state. *Hanson v. Denckla*, 357 U.S. 235 (1958). The plaintiff must establish that the defendant has "purposefully availed itself of the privilege of conducting activities within the forum state, thus

invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235 (1958). Ultimately, "the existence of minimum contacts turns on the presence or absence of intentional acts of the defendant to avail itself of some benefit of a forum state." *Waste Mgmt., Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 649 A.2d 379, 388-89 (N.J. 1994).

In this case, the Ninth Circuit was presented with a DEA agent, who individually targeted the respondents, at the Atlanta Airport, an airline hub, through which the respondents, and others must pass to reach their final destination. The Court held that personal jurisdiction and venue is proper because a substantial portion of the events giving rise to the claim occurred in Nevada: and 1) all of respondents' economic injuries were suffered in Nevada; 2) a substantial portion of the seized funds originated in Nevada; 3) petitioner's fraudulent Probable Cause Affidavit was designed to institute forfeiture proceedings against respondents after they returned to Nevada; and 4) the case became ripe only when respondents' funds were returned to Nevada. These contacts were sufficient under these facts for Nevada to exercise personal jurisdiction over Petitioner. Petitioner knew his acts would cause harm to respondents in Nevada and respondents were harmed in Nevada. Petitioner's conduct satisfied the "expressly aiming" requirement for personal jurisdiction. *Calder v. Jones*, 465 U.S. 783 (1984).

So long as the purposeful conduct creates a "substantial connection" with the forum, even a single act can support jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (defendants who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state

for the consequences of their activities). In this case, TSA agents, DEA agents, immigration agents, and/or other federal and state agents, who interact with travelers passing through an airline hub, such as Atlanta, in this case, create continuing relationships and obligations with citizens of other states. There is no rational expectation when a DEA agent approaches passengers in an airline terminal that his or her actions would cause harm solely in Atlanta, when the majority of the passengers are living in other jurisdictions.

Intentional torts may support the exercise of personal jurisdiction over a non-resident defendant who has no other contacts with the forum. *Licciardello v. Lovelady*, 544 F.3d 1280, 1285 (11th Cir. 2008) (commission of an intentional tort by a nonresident expressly aimed at a resident, the effects of which were suffered by the resident in the forum, satisfied the "effects" test established in *Calder v. Jones*). Thus, personal jurisdiction is proper over a defendant who commits an intentional and allegedly tortious act expressly aimed at the plaintiff in the forum state. *Licciardello v. Lovelady*, 544 F.3d 1280, 1288 (11th Cir. 2008) ("effects" test provides that due process is satisfied when the plaintiff brings suit in the forum where the "effects" or "brunt of the harm" caused by the defendant's intentional tortious activity was suffered); *see generally, Brennan v. Roman Catholic Diocese of Syracuse N.Y., Inc.*, 322 Fed. Appx. 852 (11th Cir. Fla. 2009) (exercise of jurisdiction over the diocese comports with fair play and substantial justice because Brennan was injured by the alleged intentional misconduct of the diocese in Florida, and Florida has a very strong interest in affording him a forum to obtain relief); *Horizon Aggressive Growth, L.P. v. Rothstein-Kass, P.A.*, 421 F.3d 1162, 1168 (11th

Cir. Fla. 2005) (reversing district court's dismissal for lack of personal jurisdiction under Florida's long-arm statute where complaint alleged defendant's communications from California to plaintiff in Florida intended to deceive and defraud plaintiff); *Acquadro v. Bergeron*, 851 So. 2d 665, 671 (Fla. 2003) (finding jurisdiction under Fla. Stat. § 48.193(1)(b) where an out-of-state defendant allegedly defamed a Florida resident during a single phone call made into Florida). In this case, the Ninth Circuit correctly found on these facts personal jurisdiction.

In *IMO Industries, Inc. v. Kiekert AG,* 155 F.3d 254 (1998) the United States Court of Appeals for the Third Circuit, interpreting *Calder*, set forth the following three-prong test in cases involving intentional torts: (1) defendant must have committed an intentional tort; (2) plaintiff must have felt the brunt of the harm caused by the tort in the forum, such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; and (3) defendant must have expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity. *IMO Industries, Inc. v. Kiekert AG,* 155 F.3d 254, 256 (1998). The *Amici Curiae* briefs argue, *inter alia*, that this Court must protect law enforcement officers. However, when state and federal agents act outside their authority, as Walsh did in this case, and cause intentional harm to passengers traveling through an airline hub, in this case in Atlanta, it should be left to the States to apply their long-arm statutes to the facts of each particular case in light of the Constitution and established precedent. This case turns specifically on its facts. The Ninth Circuit Court of Appeals properly determined personal jurisdiction and venue.

There should be no territorial limits on the power of the states to exercise adjudicatory jurisdiction. Therefore, foreign defendants should be held to the same standard of liability and responsibility for tortious activity. Jurisdictional forbearance would dramatically limit the application of long-arm statutes and narrow the "minimum contacts" analysis that courts routinely apply to determine if personal jurisdiction may be exercised over foreign defendants. Unintended consequences would apply to employees injured by intentional torts, and limit the ability to have the third party intentional torts heard in the same forum as the jurisdiction for the workers' compensation claim. No further limitations should be applicable to such claims. It is the right of every State to exercise jurisdiction for its citizens within the limits of federal constitutional due process and allow its citizens to have equal access to justice in these United States in the victim's choice of forum. This Court should affirm the Ninth Circuit Court of Appeals.

II. VENUE UNDER 28 U.S.C. § 1391(B)(2) IS PROPER IN NEVADA BECAUSE A SUBSTANTIAL PORTION OF THE EVENTS GIVING RISE TO THE CLAIM OCCURRED IN NEVADA

Venue is governed by 28 U.S.C. § 1391(b), which provides that venue is proper in any judicial district where any defendant resides if all defendants reside in the same state, or in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. 28 U.S.C. § 1391(b)(1), (2). If there is no district in which the action may otherwise be brought, venue is proper in any judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced. 28 U.S.C.

§ 1391(a)(3). Pursuant to 28 U.S.C. § 1391(b)(2), . . . "Venue in general. A civil action may be brought in—(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;" 28 U.S.C. § 1391(b)(2). The pendent-venue doctrine gives a court discretion to find venue proper where a pendent claim arises from the same nucleus of operative facts as a claim with proper federal venue. *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 529 (8th Cir. 1973) (finding pendent venue where there was pendent subject-matter jurisdiction of common-law claims derived from same nucleus of operative fact as claims resting upon Securities Exchange Act.); *Sierra Club v. Johnson*, 623 F. Supp. 2d 31 (D.D.C. 2009); *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 762 F. Supp. 2d 543 (E.D.N.Y. 2011).

A plaintiff's choice of forum is entitled to significant weight, and unless the balance is strongly in favor of a different forum, that choice "should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992) (plaintiff's choice of forum should rarely be disturbed, "unless the balance [of factors] is strongly in favor of the movant"); *but see, Tyson v. Pitney Bowes Long-Term Disability Plan*, 2007 U.S. Dist. LEXIS 90842, 2007 WL 4365332 (D.N.J. Dec. 11, 2007) (plaintiff's choice of forum is afforded less deference when their choice of forum 'has little connection with the operative facts of the lawsuit'). For Nevada to be the appropriate venue under § 1391(b)(2), "a substantial part of the events or omissions giving rise to the claim" must have occurred in Nevada. *Doe v. Mitchell,* 2009 U.S. Dist. LEXIS 29928 (D. Nev. Mar. 26, 2009). Here, the Ninth Circuit correctly balanced its application of 28 U.S.C. §1391(b)(2) and considered the place

where the respondents experienced the economic harm as one relevant factor in its broader, multifactor determination that the District of Nevada is a proper venue for respondents' lawsuit because it is a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."

The doctrine of *forum non conveniens* is nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined. But venue is a matter that goes to process rather than substantive rights – determining which among various competent courts will decide the case. *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *see also, U.S.O. Corp. v. Mizuho Holding Company, et al.*, 547 F.3d 749 (7th Cir. 2008) (applying *forum non conveniens* to an international dispute and not interstate). The Ninth Circuit Court of Appeals properly analyzed the factors and relevant considerations, and specifically held that venue was proper in Nevada.

CONCLUSION

It is inevitable, in this age of internationalization of commerce, that employees who work in the United States will travel and it is logical to expect that at airport hubs, such as Atlanta, TSA agents, DEA agents, immigration agents, and other federal and state agents will encounter passengers, the majority of which are residents from other jurisdictions. When these agents commit intentional or negligent torts on the passengers, and specifically on the facts of this case, they should be subject to personal jurisdiction in the forum state of the passenger. This is logical. This is foreseeable. Under these facts, an injury is

reasonably foreseeable. A law suit is reasonably foreseeable. Personal jurisdiction is fundamental and quintessential to satisfy the rights afforded the citizens of the United States under the United States Constitution. To fail to so find offends all notions of equity and justice. Both venue and personal jurisdiction are proper under the Ninth Circuit's analysis. For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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